

(22,867)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 100.

CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. B. COCKRELL, AS ADMINISTRATOR OF THE ESTATE OF CELIA A. BANKS, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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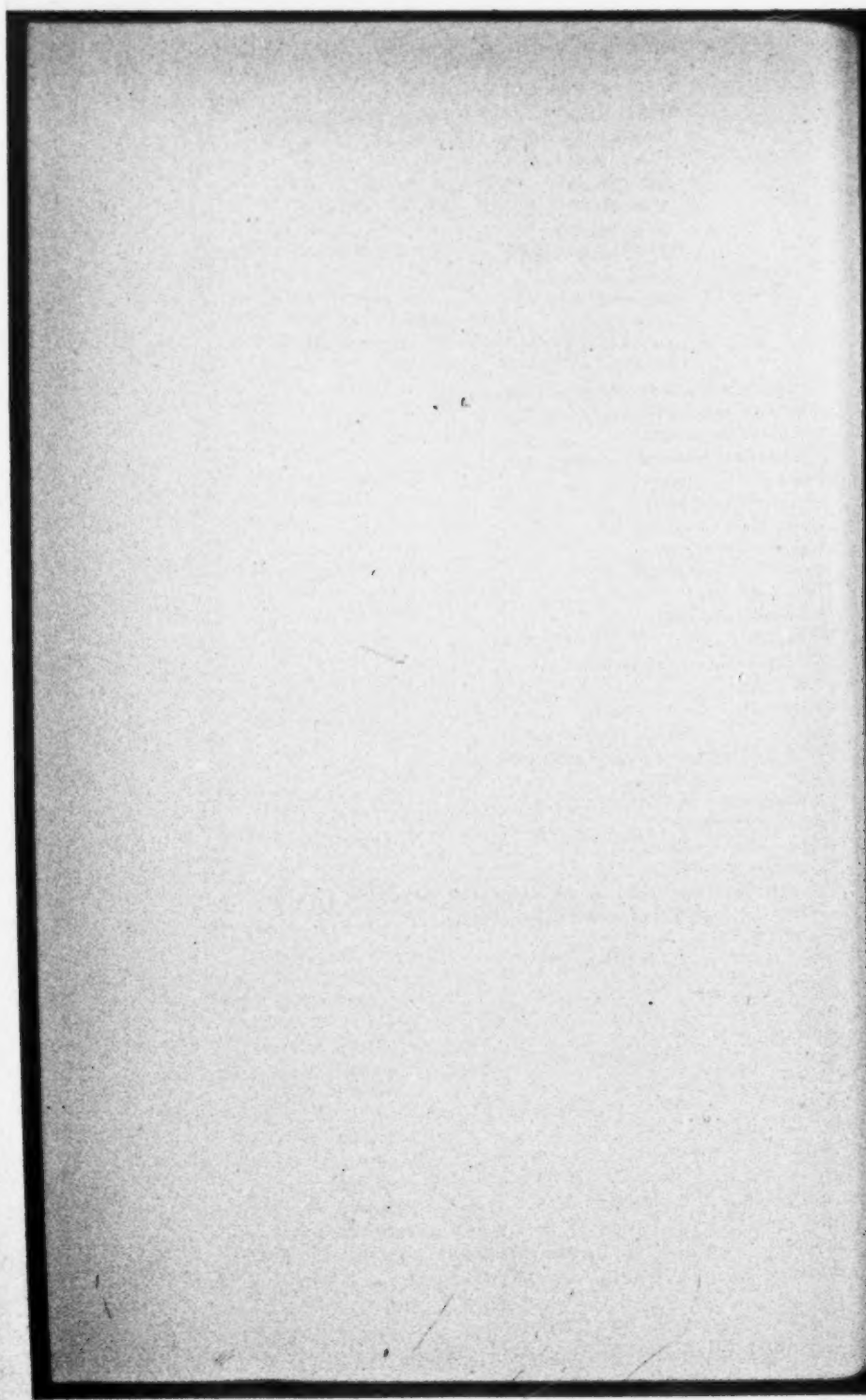
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1-3 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CHESAPEAKE & OHIO RAILWAY Co., Appellant,
vs.

L. B. COCKRELL, Administrator of Celia Banks, Deceased, Appellee.

Appeal from Clark Circuit Court.

Pleas before the Honorable the Court of Appeals of Kentucky, at
the Capitol, in Frankfort, on the Date Hereinafter Mentioned.

* * * * *

4 Pleas Began and Held before Hon. J. M. Benton, Judge of
the Clark Circuit Court, at the Court-house in Winchester,
Ky., on the 28th Day of April, 1908.Be it remembered that heretofore to-wit: On the 24th day of Feb-
ruary, 1908, plaintiff by his attorney filed in the Clerk's office of
the Clark Circuit Court, his petition, which together with the pro-
ceedings had thereon, read as follows:

Clark Circuit Court.

L. B. COCKRELL, Administrator of Celia A. Banks, Deceased,
Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY Co., EDWARD OWENS, & G. H.
SANDERS, Defendants.*Petition.*The plaintiff, L. B. Cockrell, states that one Celia A. Banks died
a resident of Breathitt county, Ky., on December —, 1907, intestate,
and that therefore he was, by proper order of the Breathitt county
court, duly appointed as her administrator, whereupon he gave bond
and qualified and since that time has been, and is now, acting in
said capacity. Certified copies of the orders of the Breathitt County
Court showing his said appointment and qualification will be filed
if required.5 "He says that the defendant, Chesapeake & Ohio Rail-
way Company, is, and was at the times hereinafter men-
tioned, a corporation duly created by law and as such authorized
to be sued in its said corporate name, and that its co-defendants,
upon the occasion hereinafter mentioned, were respectively the engi-
neer and fireman engaged in operating its engine and train of cars
which caused the injury and death of plaintiff's decedent as will be
hereinafter fully set out."

"He says that on the — day of April, 1907, defendant, Chesapeake & Ohio Railway Company, was operating a line of railroad which extends from Lexington, Ky., through Clark County, and thence eastward to the seaboard; that said railway Company passed through Winchester, Ky., at which point it maintained a regular passenger station, which was situated east of and about one square distant from Main Street in said City and was reached from said Main Street by a cross street known as Railroad street which runs east from and at right angles to said Main street, and which is, and has been for many years, a public thoroughfare in general and constant use as such by the public, for both vehicles and pedestrians," and especially by all persons going to and from said station.

"He says that said company's railroad is constructed upon said Railroad Street, and near the north side thereof, and that said railroad crosses said Main Street nearly at right angles, whence it runs eastward along said Railroad Street to the station building above described."

"Plaintiff says that Main Street is the principal thoroughfare of Winchester, and that it is necessary for passengers arriving at said company's station in said city, in order to reach Main Street, to pass westward along one side or the other of said defendant's
6 railway track, which, at this place, is a single track with a side walk for pedestrians along and adjoining each side thereof extending from the station's building westward to Main Street; and he says that said walks were at said time open to, and in general use by, the public, as was well known by defendants."

"He says further that it was necessary for passengers arriving at said station, who desired to go to that portion of Winchester which lay north of the said Company's railroad, to cross said railroad, if they alighted upon the platform on the south of the track, and vice versa if they alighted on the north platform and desired to go to that portion of the city lying south of said railroad."

"Plaintiff says that at the time above mentioned his decedent "came to Winchester from Ashland as a passenger upon the regular passenger train of defendant company; that when said train, which came from the east, stopped at Winchester, she alighted from the coach upon the side walk or platform upon the south side of said company's track, and at once started westward thereon toward Main Street; that at the time defendant company's said train was standing upon said track, headed westward, that is toward said Main Street; that she passed westward along it until she had passed the engine a short distance; that when she was thus a short distance further west than the engine and near the Main Street crossing, she undertook to cross said track to the said walk on the north side of said track at a place which was then, and for many years had been, in general use by the public for the purpose of passing and repassing over the same.

7 Plaintiff says that as his said decedent was thus attempting to cross said track defendant, the Chesapeake & Ohio Railway Co., through the gross negligence of its agents, servants and employees and the defendants, Edward Owens and G. H. Sanders,

through their own gross negligence, negligently failed to provide, maintain and keep an adequate and sufficient lookout ahead of said train at the time said decedent went upon said track and was run over, and negligently failed to provide maintain and keep any outlook at all upon the left or south side thereof; and negligently failed to give any signal or warning of the starting or approach of said train, and negligently ran said engine and cars upon and over said decedent and crushed and bruised, cut and mangled her head, body and limbs to such an extent that one of her legs above the knee had to be and was immediately amputated, and she was otherwise horribly crushed, injured and bruised so that on December —, 1907, she died from the injuries thus sustained.

Plaintiff says further that the place at which his said decedent attempted to cross said track as aforesaid was very near to and about Main Street, which is a public highway, and the most frequently travelled thoroughfare in Winchester, and that in addition to the negligence above set out the defendants were also grossly negligent in this; that after said decedent was struck by said engine she was pushed and rolled by the engine on to said street and upon and partly across said street from about its east margin to about the center of same, a distance of about — feet before she was run over or materially injured; and he says that but for the gross negligence

8 of defendants they could have seen plaintiff in time to have stopped before striking her; and after striking her and after she had been pushed by the engine to the east margin of Main Street, they could still, but for their gross negligence have stopped said train, which was at the time moving very slowly, before it ran over or materially injured her, but that instead of stopping in order to save her life, which they could easily have done, they were grossly negligent in that they continued to run said engine forward until it had passed over her body about the middle of said street and injured her as above set out.

He says that all of the acts and omissions herein complained of were due to and caused by the gross negligence of the defendants engaged in equipping, controlling, directing and operating said engine and train of cars and that thereby the plaintiff, as administrator of decedent's estate, was and is damaged in the sum of \$25,000.00.

Wherefore, the plaintiff, L. B. Cockrell, as administrator of Celia A. Banks, deceased, prays judgment against the defendants, Chesapeake & Ohio Railway Company, Edward Owens and G. H. Sanders, in the sum of \$25,000.00, and he prays for his costs and all proper relief.

JOUET, BYRD & JOUETT,

Att'ys for Plaintiff.

Summons issued on the foregoing petition, directed to and returned by the Sheriff of Clark County, reads as follows:

The Commonwealth of Kentucky to the Sheriff of Clark County,
Greeting:

You are commanded to summon Chesapeake & Ohio Railway Company, Edward Owens & G. H. Sanders, to answer in 10 days

after the service of this summons a petition filed against them in the
 Clark Circuit Court by Celia A. Banks' Administrator and
 9 warn them that upon their failure to answer, the petition
 will be taken for confessed, or they will be proceeded against
 for contempt, and you will make due return of this summons within
 10 days after the service thereof, to the Clerk's Office of said Court.

Given under my hand as Clerk of said Court, this 24th day of
 February, 1908.

W. T. FOX, *Clerk.*

(Sheriff's Return.)

Executed the within summons February 24th, 1908, Chesapeake
 & Ohio Railway Company by delivering to A. G. Locknane chief
 Agent in this County for said road a true copy thereof and on Ed-
 ward Owens engineer on Chesapeake & Ohio Railway Company pas-
 senger train a true copy thereof.

A. HOWARD HAMPTON, S. C. C.,
 By JNO. G. BEDFORD, D. S.

Summons issued on the foregoing petition, directed to, and re-
 turned by the Sheriff of Fayette County, reads as follows:

The Commonwealth of Kentucky to the Sheriff of Fayette County,
 Greeting:

You are commanded to summon Edward Owens and G. H. San-
 ders to answer in 20 days after the service of this summons, a peti-
 tion filed against them &c., in the Clark Circuit Court by, Celia A.
 Banks' Administrator and warn them that upon their failure to
 answer, the petition will be taken for confessed, or they will be pro-
 ceeded against for contempt, and you will make due return of this
 summons within 20 days after the service thereof, to the Clerk's
 office of said court.

Given under my hand as Clerk of said Court, this 24th day of
 February, 1908.

W. T. FOX, *Clerk.*

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(Sheriff's Return.)

Executed February 25th, 1908, by delivering to Edward Owens
 and G. H. Sanders each a true copy of the within summons.

JOHN McELROY, S. F. C.
 By FRANK ROGERS, D. S.

Clark Circuit Court, April Term, April 6th, 1908.

CELIA A. BANKS' ADMINISTRATOR

VS.

CHESAPEAKE & OHIO R. R. Co.

Comes the defendant, Chesapeake & Ohio Railway Company, by
 Messrs. Pendleton, Bush & Bush, its attorneys, and presents and

files its petition for the removal of this action into the circuit court of the United States for the Eastern District of Kentucky, and at the same time presents and files its bond for such removal with John T. Shelby and D. L. Pendleton, as sureties thereon; thereupon said defendant moves the Court to accept said surety and bond, and to cause this action and the record in same to be removed into the Circuit Court of the United States of the Eastern District of Kentucky, and to proceed no further herein.

Clark Circuit Court, April Term, April 8th, 1908.

CELIA BANKS' ADMINISTRATOR, &c.,

vs.

CHESAPEAKE & OHIO R. R. Co.

The Court approved the bond for removal heretofore executed and filed herein.

Said petition for removal filed April 6th, 1908, reads as follows:

Clark Circuit Court.

L. B. COCKRELL, Administrator of Celia A. Banks, Deceased.
Plaintiff,

11 L. B. Cockrell, Administrator of Celia A. Banks, Deceased,
Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Defendants.

Petition for Removal.

To the Clark Circuit Court, State of Kentucky:

Your Petitioner, Chesapeake and Ohio Railway Company, one of the defendants in the above entitled action, respectively states: That it was at the commencement of the above entitled action, has ever since been, and is now, a corporation duly created by, and organized under, the laws of the state of Virginia, and a citizen and resident of said State of Virginia, and neither a citizen nor resident of the State of Kentucky, that the plaintiff, L. B. Cockrell, administrator of Celia A. Banks, deceased, was at the commencement of said action, has ever since been, and is now, a citizen and resident of the State of Kentucky, and of the Eastern United States Judicial District of said State:

That there is in said action controversies which are wholly between citizens of different States, viz: between the plaintiff and this Petitioner, which can be wholly determined as between them to-wit: A controversy as to whether plaintiff's intestate, Celia A. Banks, was struck and injured by the engine and cars referred to in plaintiff's petition by any negligence or carelessness of this Petitioner, or of its officers, agents, servants or employes in charge of said engine and cars, and also whether at the time of the accident referred to in said petition the said intestate was herself in the exercise of ordinary care

for her own safety, and whether but for her failure to use such care said accident would have occurred, and also a controversy as to whether, after plaintiff's intestate was struck and knocked
12 down by said engine, this Petitioner or either of its co-defendants, Edward Owens, and G. H. Sanders, could have seen the plaintiff's intestate in time to have stopped said engine before the same struck her, and also a controversy as to whether, after said decedent was knocked down and struck by said engine, this petitioner or either of its said co-defendants could have stopped said train and also a controversy as to whether the death of said intestate was due to the injuries thus received, before it ran over or materially injured said decedent; each of which said controversies is a wholly separable one from those between plaintiff and this Petitioner's said co-defendants, and can be tried and determined without the presence of either of said co-defendants.

Petitioner further says that the allegations made in plaintiff's petition that the railroad track in said petition mentioned is constructed upon Railroad Street; that the place where said intestate undertook to cross said railroad track was then or had been in general use by the public for the purpose of passing and repassing over the same; that as said decedent was thus attempting to cross said track the Petitioner, through the gross negligence of its agents and the said co-defendants, through their own gross negligence, negligently failed to provide, maintain and keep an adequate and sufficient lookout ahead of said train at the time said decedent went upon said track and was run over, and negligently failed to provide, maintain and keep any lookout at all upon the left or south side thereof; and negligently failed to give any signal or warning of the starting or approach of said train, and negligently ran said engine and cars upon and over said decedent and crushed and bruised, cut and mangled her head body and limbs to such an extent that one of her
13 legs above the knee had to be and was immediately amputated and she was otherwise horribly crushed, injured and bruised so that on December 1907, she died from the injuries thus sustained; that this Petitioner or either of its said co-defendants were negligent in that after said decedent was struck by said engine she was pushed and rolled by the said engine on to said street and upon and partly across said street from about its east margin to about the center of same, a distance of feet before she was run over or materially injured; and that but for the gross negligence of the defendants they could have seen plaintiff's intestate in time to have stopped before striking her; and after striking her and after she was pushed by the engine to the east margin of Main Street this Petitioner or either of its said co-defendants could still but for their gross negligence have stopped said train, which was at the time moving very slowly, before it ran over or materially injured said intestate, but that instead of stopping in order to save her life, which they could have easily have done, they were grossly negligent in that they continued to run said engine forward until it had passed over her body about the middle of said street; that all or any of the acts or omissions in the plaintiff's petition complained of were due

to or caused by the gross negligence of the said defendants engaged in equipping, controlling, directing or operating said engine and train of cars, and that thereby the plaintiff, as administrator of decedent's estate, was or is damaged in the sum of \$25,000.00, are each and all of them false and untrue, and were known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder of said Owens and said Sanders with this Petitioner in this action, and for the purpose of thereby fraudulently depriving this Petitioner of its right under the Constitution and laws of the United States to have this action removed into the circuit court of the United States for the Eastern District of Kentucky, and that neither of said allegations as to either said Owens or said Sanders can be sustained by the plaintiff on the trial of this action.

That this action is of a civil nature, and that the matter and amount in controversy in said action between the plaintiff and this Petitioner exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars (\$2,000.00).

Your Petitioner offers herewith a bond with good and sufficient surety for its entering in the Circuit Court of the United States for the Eastern District of Kentucky, on the first day of its next session, a copy of the record in this suit, and for paying all the costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your Petitioner prays this Honorable Court to proceed no further herein, except to accept said surety and bond and to cause this action and the record in same to be removed into the Circuit Court of the United States for the Eastern District of Kentucky.

J. T. SHELBY,

PENDLETON, BUSH & BUSH,

Attorneys for Petitioner.

STATE OF KENTUCKY,

Clark County:

Affiant, A. G. Locknane, says that he is passenger and Freight Agent of the above named Petitioner, Chesapeake & Ohio Railway Company, at Winchester, Clark County Kentucky, and that he believes the statements contained in the foregoing petition to be true.

A. G. LOCKNANE.

15 Subscribed and sworn to before me by said affiant this 6th day of April, 1908.

W. T. FOX, *Clerk.*

C. B. FOX, *D. C.*

Said bond filed April 6th, 1908, reads as follows:

Know all men by these presents: That we, Chesapeake & Ohio Railway Company, as principal, and John T. Shelby, and D. L. Pendleton, as sureties, are held and firmly bound unto L. B. Cockrell, administrator of Celia A. Banks, deceased, in the penal sum of

One Thousand Dollars (\$1,000.00), the payment whereof well and truly to be made unto the said L. B. Cockrell, administrator afore-said, his successors and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents:

Yet upon these conditions: The said Chesapeake and Ohio Railway Company having petitioned the Circuit Court of Clark County, State of Kentucky, for the removal of a certain cause therein pending, wherein L. B. Cockrell, administrator of Celia A. Banks, deceased, is plaintiff, and Chesapeake and Ohio Railway company and others are defendants, to the circuit court of the United States for the Eastern District of Kentucky.

Now if the said Chesapeake and Ohio Railway Company shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands this 6th day of April, 1908.

CHESAPEAKE & OHIO RAILWAY
COMPANY,

By JNO. T. SHELBY, *Attorney.*

D. L. PENDLETON.

JOHN T. SHELBY.

16-34 Clark Circuit Court, April Term, April 8th, 1908.

CELIA BANKS' ADM'R.

VS.

C. & O. R. R. Co., &c.

The court being advised overruled defendant's motion for a removal of this case to the U. S. Court for the Eastern District of Kentucky, to which ruling of the Court defendants excepted.

This case is set for trial on the 14th day of the present term.

* * * * *

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April Term, April 28th, 1908.

CELIA A. BANKS' ADM'R.

VS.

C. & O. Rwy. Co.

The jury impaneled herein met pursuant to adjournment and hearing the completion of argument by counsel retired and returned to Court the following verdict, to-wit: "We the jury find for the plaintiff the sum of Five Thousand Dollars (\$5,000.00). W. A. Adams, J. E. Douglas, G. W. Lewis, F. N. Owen, W. C. Brock, J. W. Burton, W. E. Weldon, B. A. Tracy, E. G. Baxter, George W. Martin, T. S. Bush." Wherefore it is adjudged by the Court that the

plaintiff recover of the defendant, Chesapeake & Ohio Rwy. Company the sum of Five Thousand Dollars, with interest thereon from this State until paid, and his costs herein expended.

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Clark Circuit Court, April 29th, 1908.

CELIA BANKS' ADM'R.

VS.

C. & O. Rwy. Co.

Defendant moved the Court for a new trial of this case, and filed written motion and written grounds in support of same.

Said motion and grounds for new trial filed April 29th, 1908, reads as follows:

Clark Circuit Court.

CELIA BANKS' ADM'R, Plaintiff,

VS.

Motion and Grounds for a New Trial.

The defendant, Chesapeake & Ohio Railway Company, moves the Court to set aside the verdict and judgment entered thereon herein, and grant it a new trial:

1. Because the Court erred in admitting improper and incompetent evidence offered by the plaintiff, to which objections were made by the defendant at the time, and to which ruling the defendant then excepted.

2. Because the Court erred in refusing to admit and in rejecting competent evidence offered by the defendant, to which rulings of the Court the defendant then excepted.

3. Because the Court over the objection of the defendant permitted the attorney for the plaintiff to state in his argument before the jury that the engineer, Owens, in his deposition, which was not read in evidence, said that he did not remember that he rang the bell before starting the train independent of his report made at the time, and that his recollection was based on the report.

4. Because the Court erred in permitting David Banks, Jr., over the objection of the defendant, C. & O. Railway Company, to testify for himself concerning statement of, transactions with, and acts done and omitted to be done, by his mother, Celia Banks, who was dead at the time he testified, and whose administrator is prosecuting this action, to which rulings of the Court in permitting said David Banks, Jr., to testify, as aforesaid, this defendant at the time excepted.

5. Because the Court erred in permitting J. F. Banks, the husband of said decedent, Celia Banks, to testify for himself concerning statements of, transactions with, and acts done and omitted to be done by the said Celia Banks, and also in permitting the said J. P.

Banks, who was the husband of Celia Banks, to testify for the administrator of his deceased wife in this action, all of which testimony was permitted by the Court over the objection of the defendant Railway Company, and to which rulings of the Court in permitting the same this defendant excepted at the time.

6. Because the Court erred in giving the instructions which were given to the jury over the objection of this defendant, to which this defendant excepted at the time.

7. Because the Court erred in refusing to give instructions asked by this defendant, to which ruling of the Court in so refusing this defendant then excepted.

8. Because the Court erred in refusing to give an instruction at the close of the plaintiff's testimony to the jury to find for the defendant, Railway Company, which instruction was then asked by this defendant, and to which ruling of the Court it then excepted.

9. Because the Court erred in refusing to give an instruction, at the close of evidence to the jury to find for the defendant Railway Company, which instruction was then asked by the said defendant, and to which ruling of the Court in so refusing to give the same, it then excepted.

10. Because the Court erred in admitting the testimony of L. B. Cockrell, and in permitting the said L. B. Cockrell to state that he was the administrator of Celia Banks, and further because
38 the Court erred in admitting this incompetent evidence, when the certificate of his appointment was not introduced in evidence.

11. Because it was not proven by competent evidence that L. B. Cockrell was the Administrator of Celia Banks deceased in this action.

12. Because the Court erred in refusing before the trial and at the close of the plaintiff's testimony to sustain the motion of this defendant to remove this cause to the Circuit Court of the United States for the Eastern District of Kentucky, and in overruling said motions, and in not removing this case, to said court, to which the defendant then excepted.

13. Because the Court erred in giving instructions Nos. 1, 2, and 3, to the giving of which this defendant then excepted.

14. Because the Court erred in refusing to give instructions A, B, C, (1), C, (2), D, (2), E, and F, all of which instructions were asked by this defendant and refused by the Court in the order above stated, to the rulings of the Court in each instance this defendant excepted.

15. Because the verdict is flagrantly and palpably against the evidence and is not supported by sufficient evidence.

16. Because the verdict is contrary to law.

17. Because the amount of damages assessed in the verdict is excessive and is not sustained by the evidence, and is so excessive as to show that it is the result of passion and prejudice in the minds of the jury.

C. & O. RWY. CO.,
By PENDLETON, BUSH & BUSH,
Att'ys.

39-286 Clark Circuit Court, Dec. Term, Jan. 20th, 1909.

CELIA BANKS' ADM'R

VS.

C. & O. Rwy. Co.

The Court being advised overruled defendant's motion for a new trial of this case, to which ruling of the Court defendant excepted, and prayed an appeal to the Court of Appeals of Kentucky, which is granted.

* * * * *

287 Be it remembered that on the 8th day of June, 1911, at a Court of Appeals held at the Capitol, in Frankfort, the following judgment was entered:

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,

VS.

CELIA BANKS' ADM'R, Appellee.

Appeal from Clark Circuit Court.

The Court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said Court.

It is further considered that appellee recover of appellant all his costs herein expended.

And on said date the Court delivered the following opinion:

288 Court of Appeals of Kentucky.

JUNE 8, 1911.

CHESAPEAKE & OHIO RAILWAY COMPANY ET AL., Appellants,

VS.

CELIA BANKS' ADM'R, Appellee.

Appeal from Clark Circuit Court.

Opinion of the Court by Judge Carroll, Affirming.

In this action by the administrator of Celia Banks to recover damages for her death alleged to have been caused by the negligence of the appellant railway company and its employees, a number of reasons are presented by counsel for the company why the judgment in favor of appellee against it should be reversed. But, before entering upon a discussion of the facts, and the errors alleged to have been committed during the trial, we will dispose of the ques-

tion raised—that the case should have been removed to the Federal court on the motion and petition of the appellant company, which was made and presented in due time and form.

289 The appellant company is a Virginia corporation, and the suit was brought against it, Edward Owens the engineer and G. H. Sanders the fireman, both of whom are citizens of Kentucky and in charge of the engine that struck appellee's intestate.

The allegations of the petition necessary to be noticed in considering the point under consideration are as follows:

"Plaintiff says that as his said decedent was thus attempting to cross said track, defendant, the Chesapeake & Ohio Railway Company, through the gross negligence of its agents, servants and employees, and the defendant Edward Owens and G. H. Sanders through their own gross negligence, negligently failed to provide, maintain and keep an adequate and sufficient lookout ahead of said train at the time said decedent went upon said track and was run over; and negligently failed to provide, maintain and keep a lookout at all upon the left side thereof; and negligently failed to give any signal or warning of the starting or approach of said train; and negligently ran said engine and cars upon and over said decedent, and crushed, bruised, cut and mangled her head, body and limbs;

* * * that but for the gross negligence of defendants, they could have seen plaintiff's decedent in time to have stopped before striking her, and, after striking her and after she had been pushed by the engine to the east margin of Main street, they could still but for their gross negligence have stopped said train, which was at the time moving very slowly, before it ran over or materially injured her; but that instead of stopping in order to save her life, which they could easily have done, they were grossly negligent in that they continued to run said engine forward until it had passed over her body: * * * he says that all of the acts and omissions herein complained of were due to and caused by the gross negligence of the defendants engaged in equipping, controlling, directing and operating said engine and train of cars."

The petition for removal on the part of the railway company did not deny that Celia Banks was struck and killed by one of its engines in charge of Owens and Sanders; but, after denying specifically the averments of the petition charging it, the engineer and fireman with negligence, averred—

"that each and all of them were false and untrue, and were known to the plaintiff or could have been known by the exercise of ordinary diligence to be false and untrue, but were made for the sole and fraudulent purpose of affording a basis if possible for the fraudulent joinder of the said Owens and Sanders with this petitioner in this action, and for the purpose of thereby fraudulently depriving this petitioner of its right under the Constitution and laws of the United States to have this action removed into the Circuit Court of the United States for the Eastern District of Kentucky; and that neither of said allegations as to either said Owens or said Sanders can be sustained by the plaintiff on the trial of this action."

It is now the contention of counsel for the appellant company that—

“for the purpose of determining its right to a removal, the lower court was bound to take the averments of the removal petition as true, and that taking them as true the right to remove was clearly made out. That where admitting averments of the removal petition to be true, where they made a proper case for removal, the application for removal in itself works ipso facto the transfer to the Federal court and deprives the State court of its jurisdiction; and if the plaintiff desires to make an issue upon the truth of the averments upon which the right of removal is based, he must do this—not in the State court but in the Federal court, which latter court alone has jurisdiction to try such issue.”

It will at once be perceived that if this contention is maintainable the action against the railroad company should have been removed. Although the petition stated a joint cause of action against all of the defendants sufficient to sustain a joint or several judgment against them. It will further be seen that its admission as a rule of practice would operate to work a removal to the Federal court so far as the non-resident defendant was concerned of every action involving two thousand dollars or more brought in a State court against a non-resident and resident defendants, and give to the Federal courts the exclusive right to hear and determine whether or not the action should be removed. The argument of counsel is that although the petition of the plaintiff may be able to support the petition by evidence that would amply sustain a judgment against all of them, nevertheless if the plaintiff may in good faith state a good joint cause of action against all of the defendants, although the petition for removal charges as in this case that the joinder of the resident defendants was fraudulent the State court is at once and upon the filing of the removal petition divested of jurisdiction to hear and determine the question of removal, and the action must be at once transferred to the Federal court, in which court the plaintiff if he desires to have the action remanded to the State court may go and make his motion, which the Federal court may grant or refuse as in its judgment may seem right and proper. Counsel, in short, would have us say that such an action as we have described brought in a State court that had jurisdiction of the subject matter of the action and the parties must be removed upon the mere filing of the petition, although the action could not have been brought in the Federal court in the first instance, as the Federal courts have not jurisdiction where there is a joint controversy and one of the defendants is a resident of the State in which the action is brought.

We fully appreciate the fact that in cases in which the Federal courts have jurisdiction their authority is paramount to that of the State courts and that the State courts must yield in all cases in which there is conflict of jurisdiction; where the point in issue involves a Federal question and it has been ruled by the Supreme Court, the State courts should and do follow its ruling. But, on the other hand, if the action has been brought in a State court that has juris

diction of the subject matter as well as of the parties to the action, its right to hear and determine the cause should not be surrendered in the absence of a plain ruling adverse to its jurisdiction by a court of superior authority. Questions like this have come before the Supreme Court in many cases, but we do not think the decisions of that Court sustain counsel in his contention that the filing of a sufficient removal petition and bond in an action rightfully brought in a State court and that could not be brought originally in the Federal court, operates to transfer the case merely because the removal petition charges a fraudulent joinder.

In *Alabama Great Southern R. Co. v. Thompson*, 200 U. S., 206, 50 L. ed., 441, an action was brought in a State court in Tennessee by the administrator of Florence James, who was a citizen of that State, for the negligent killing of his intestate by the defendant railroad company, against the railroad, an Alabama corporation, and mills and Fuller, both citizens of Tennessee. The petition averred in substance that the plaintiff's intestate had been negligently and wrongfully run over while upon the track of the railroad company by an engine and train of cars owned and operated by it, which was at the time under the management and control of Mills, its conductor, and Fuller, its engineer. The court, quoting with approval from the case of *Powers v. Chesapeake & Ohio R. Co.*, 169 U. S., 92, 42 L. ed., 673, said—

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" To the same

effect is *L. & N. R. Co., v. Wangelin*, 132 U. S. 598, 33 L. ed., 295 474.

In *Wecker v. National Enameling Co.*, 204 U. S., 176, 51 L. ed., 430, it is said—

"While the plaintiff, in good faith, may proceed in the State courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction."

In *Stone v. State of South Carolina*, 117 U. S., 430, 29 L. ed., 962, the Court said—

"A state court is not bound to surrender its jurisdiction of a suit on a petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the circuit court begins." To the same effect is *Crehore v. Ohio & Mississippi R. Co.*, 131 U. S., 240, 33 L. ed., 144.

These cases illustrate the rulings of the Supreme Court upon the question, and in no one of them or indeed in any other we have examined has it been held that the mere filing of a removal petition works a transfer in cases where the State court had and the Federal court did not have original jurisdiction.

A different rule obtains when the action brought in the State court and sought to be removed is one that might have originally been brought in the Federal court, and this distinction should always be kept in mind in determining the right and power of the State court to pass upon the question of removal. To re-state the proposition—if the State court in which the action is pending had, and the Federal court did not have, original jurisdiction of the subject matter of the action, it is for the State court to determine the question of removal. On the other hand, if the action sought to be removed might have originally been brought in the Federal court, then the filing of the removal petition with a sufficient bond operates to transfer the case from the State court to the Federal court. This distinction is well recognized in *Burlington R. Co. v. Dunn*, 122 U. S., 513, 30 L. Ed., 1159; and *Texas & Pacific R. Co. v. Eastin*, 214 U. S., 153, 53 L. Ed., 946.

But, it is claimed by counsel that the decisions of this court upon the question under consideration are conflicting, as the Court in

Illinois Central R. Co. v. Jones, 118 Ky., 163 held that after the filing of a removal petition accompanied by a sufficient bond the State court could proceed no further; while in the cases of *Illinois Central R. Co. v. Coley*, 121 Ky., 385, *Dudley v. Illinois Central R. Co.*, 127 Ky., 221; and *Underwood v. Illinois Central R. Co.*, 103 S. W., 322, and others, it was held that the State court had the right to inquire whether the facts alleged in the petition for removal were true, and to determine for itself whether the action was removable. In the *Jones* case is found the following, which counsel argues is in conflict with subsequent cases—

"If the petition for removal be filed in the State court in due season, and be accompanied by sufficient bond and motion, and if the petition states facts showing, or if it and the record together then show, a prima facie right to the removal by the petitioner, it is the duty of the State court to proceed no further than to satisfy itself as to the sufficiency of the bond."

But, in this expression the court had reference to cases of which the Federal court had original jurisdiction, and not to cases in

which exclusive original jurisdiction was in the State court. This is made plain by the following excerpt from the opinion—

"But whether, upon the facts stated in the petition and record, there was presented a federal case, was within the jurisdiction of the State court to adjudge (citing authorities). While the
298 State courts can not inquire whether the facts alleged in the petition for removal are true, yet, when the petition for removal and the record do not show a prima facie right to the removal, the State court may refuse to surrender the case, and will proceed to its trial."

In the Coley case, the suit was brought against the railroad company, a foreign corporation, and the engineer of the train, a citizen of Kentucky. The petition for removal charged that the engineer was joined for the fraudulent purpose of preventing the removal, and the insistence was made, as in this case, that upon the filing of the petition the case should have been transferred. But, in answer to that contention this Court said—

"The effect of this would be to give the Federal courts jurisdiction of the merits of the case in actions of this sort, although such jurisdiction is expressly withheld by the act of Congress. * * * The State court has jurisdiction to try the merits of the case if there is a joint controversy, and it will not do to say that the action must be transferred to the Federal court for that court to determine whether the State court may try the case on the merits."

In the Dudley case, a resident citizen was joined as a defendant with a foreign corporation. The petition for removal was denied, and upon the trial of the case when the plaintiff had concluded his evidence the court directed the jury to return a verdict in favor of the resident defendant. Thereupon the foreign railroad company renewed its motion for removal, which was sustained. In considering the case the Court said—

299 "It is true that it is for the State court to determine from the record when the motion for a transfer is made whether or not there is then presented a state of case authorizing a transfer. * * * And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly. * * * But when during the progress of the trial, for instance, at the close of the plaintiff's evidence, it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the belief or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff by making allegations that he must have known he could not establish to deprive the defendant of a right guaranteed to it or him by the law."

There is no conflict in the decisions of this Court, nor are its opinions in conflict with the decisions of the Supreme Court. *Illinois Central R. Co. v. Houchins*, 121 Ky., 530; *Ward v. Pullman Car Corporation*, 131 Ky., 142.

But, in an effort to put at rest any doubt as to the position of

this Court upon questions like the one presented in this case, we hold: (1) That when a petition against a non-resident and resident defendants states a good joint cause of action against all of them, and a petition for removal is filed, charging that the resident defendants have been joined for the fraudulent purpose of defeating a transfer of the case, it is for the State Court in which the action is pending to determine as a matter of law from an inspection of the petition of the plaintiff and the petition for removal whether the action shall or not be removed, unless the action was one that could upon the averments of the petition have been brought in the Federal Court. (2) If the petition for removal is accompanied by affidavits supporting its averments, the plaintiff may also file controverting affidavits, and the State court may then pass upon the question and determine for itself whether the action shall or not be removed. (3) If the State court upon the filing of the petition for removal alone, or accompanied with affidavits, declines to order a removal, and the case goes to trial, the non-resident defendant may upon the conclusion of the evidence for the plaintiff or after all the evidence is in again move the court for a removal; and if, upon hearing the plaintiff's evidence, or all the evidence, the State court is of the opinion that there was a fraudulent joinder, and that the plaintiff did not in good faith have any reason to believe when he filed his petition that he could make out a case against the resident defendants, the action should be removed; otherwise not. (4) If the petition filed by the plaintiff in the State Court states a cause of action that might have been brought in the Federal court, or rather a cause of action that the Federal court would have original jurisdiction of, and a petition for removal is filed in due time, accompanied by a sufficient bond, and the removal petition or the record as made up shows a right of removal, the State court should without delay so order. From what we have said, it follows that the court did not err in refusing to remove the case when the petition for removal was filed, as upon the averments of the petition a cause of action was stated that could not have been brought in the Federal court, as the Federal court has not jurisdiction of an action like this between resident parties or an action in which one of the defendants jointly sued is a resident. Nor did the court err in refusing a transfer on the motion made for that purpose after the evidence was in, as the record as then made up did not show that the plaintiff when the suit was filed did not in good faith have reason to believe that an action could be maintained against both the engineer and fireman. On the contrary, we are of the opinion that the evidence made out a case of actionable negligence against the fireman, and that the court should not have directed a verdict in his favor.

In April 1907 Celia Banks, a woman about forty-five years of age, accompanied by her son, her father-in-law and other members of her family, arrived at Winchester, a city of several thousand population, on the morning express train from Ashland, Kentucky. The appellant railroad company's main line

at Winchester runs east and west, and its passenger station is about a square east of Main Street, which is the principal thoroughfare of the city and crosses the railroad at right angles. This street is reached from the station by a concrete walk adjoining the track. Passengers arriving on trains use this concrete walk to Main Street; and, if they desire to go into the northern part of the city, they cross defendant's track at Main Street. The train from which Mrs. Banks alighted, stopped a few minutes at Winchester for the purpose of receiving and discharging passengers, and then started on its journey west and towards Main street. Mrs. Banks and her party, after leaving the train, walked down the concrete walk to Main Street, and, desiring to go into the northern part of the city, they started across the track. About the time Mrs. Banks reached Main Street, the train started, and when it had traveled a few feet and acquired a speed estimated at from two to five miles an hour, Mrs. Banks stepped from the concrete walk on to the track in an effort to cross it. She wore a sun-bonnet, and her back was at least partly to the engine, and when she had taken a few steps from the concrete walk towards the track she was struck by the engine, and rolled by it on
308 the side of the track until she reached the middle of Main Street, some forty feet distant from where she was struck. At this point she was run over by the wheels of the engine, which cut off one leg and inflicted other serious injuries, from which she died.

The decisive questions of fact in the case are—(1) Did the persons in charge of the engine keep such a lookout as their duty to the public required them to keep, (2) If they had kept such a lookout could the injury to Mrs. Banks have been avoided, (3) Was she guilty of such contributory negligence as would defeat a recovery. Other important questions are—How close was Mrs. Banks to the engine when she stepped off the concrete walk on to the track; the speed of the train when she stepped on the track, and, within what space it could have been stopped.

A number of persons saw the accident, but as they viewed it from different standpoints there is much conflict in their evidence in respect to the controlling questions of fact that we have mentioned. Without relating in detail the evidence, we deem it sufficient to say that the testimony for appellee conduced to show that the engine at the time Mrs. Banks stepped off the concrete walk towards and on to the track was about twenty feet from her, and running at a speed of three or four miles an hour, and that it could have been
304 stopped in a distance of not exceeding twelve feet if a signal to stop had then been given to the engineer. On the other hand, the evidence for the appellant is to the effect that when she stepped on the track the engine was only ten or twelve feet from her and running some six or eight miles an hour; and that after she stepped on the track the engine could not have been stopped before striking her. She stepped on the track on the fireman's side of the engine, and it is conceded that the engineer could not have seen her if he had been keeping a lookout, as the boiler projected so far ahead of the cab that the view of a person on the fireman's side

within forty or fifty feet of the engine was obstructed by the boiler and front of the engine. The fireman testified that when or about the time the train started he put in a few shovels of coal and then stepped out in the gang-way between the cab and the tender and was looking back at the rear end of the train when he heard a call of distress, and saw Mrs. Banks nearly under or under the engine on his side; and that as soon as he discovered her he at once signalled to the engineer to stop the train and he did so as soon as possible.

We have then this condition of affairs—this train when it started from the depot was within a few feet of a much traveled street in a populous district of the city but the engineer however sharp a lookout he was keeping could not see persons at the street crossing approaching or on the track on the fireman's side after the engine started, and the fireman was engaged in looking at the rear
305 end of the train. The result of this was that no lookout for travelers at this crossing was kept at the time Mrs. Banks was struck. The engineer could not see the crossing in front of his engine, and the fireman was looking in another direction. As under the circumstances of this case it was the duty of the company through its engineer and fireman to keep a lookout at this time and place, there was evidence sufficient to authorize a submission of the case to the jury and sustain a verdict, upon the ground that if a lookout had been kept by the fireman, the accident to Mrs. Banks could have been averted. So that the vital question in the case is—was the fireman negligent in failing to keep a lookout. We have never gone to the extent of holding that railroad companies should have a third person in the engine to keep a lookout at times and places where this duty is demanded, and when the other duties and situation of the engineer and fireman were such that they could not do so. Nor have we ruled that either the engineer or fireman must postpone when they are approaching a crossing at which the presence of travelers must be anticipated, the performance of essential duties in connection with the running of the train that interfere with their keeping a lookout. Nor is it necessary to sustain the judgment that we should so hold in this case, as we think the fireman was guilty of negligence in failing to keep a lookout in front of the engine
306 at the time he was looking at the rear of the train, and that if he had been keeping such a lookout he could have discovered the presence of Mrs. Banks on the track in time to have signalled the engineer to stop the train, and that it could have been stopped before striking her. If it was not the duty of both the fireman and engineer under the circumstances described to keep a lookout, it is difficult to imagine a state of case in which the lookout duty would be required as men, women and children at this point were constantly crossing the track in going from one part of the city to another, and from one street to another. It is attempted however to excuse the conduct of the fireman in looking at the rear of the train in place of in front of the engine upon the ground as stated by counsel

“that it is more important for the safety of the traveling public

that the fireman in such case should look back to see if the train is clearing the station without injuring passengers and to be ready to receive signals in case of danger where persons are boarding the train or alighting from it, than it is for him to look ahead."

But this argument does not meet or answer the duty of the railroad company at the time and place this accident happened. There may be times and places in which a fireman would be excused in looking towards the rear of the train, rather than in front of it, but this was neither such time nor place. The train was equipped with a

full crew, who could and doubtless did exercise care to see
307 that passengers were not injured by the negligence of the company in boarding or alighting from the train, and to them the fireman should have left this duty. Nor is the negligence of the fireman to be excused upon the theory that he could not have anticipated that Mrs. Banks would step from a place of safety on the track in front of the moving engine. It is negligence of this character on the part of travelers that persons in charge of an engine approaching crossings where travelers have a right to be and go that makes it the duty of trainmen to anticipate and protect them if they can from accident and injury. Except for the fact that travelers are negligent, it would not be necessary for trainmen to keep a lookout at any street or crossing. Nearly every crossing accident that happens is due in more or less degree to the negligence of the traveler, and it is the recognition of this carelessness or thoughtlessness on the part of the traveling public that has induced the law to impose upon persons in charge of an engine the duty of keeping a lookout at crossings.

Nor does the fact that the bell may have been ringing or that the crossing gates on Main Street were down, excuse or diminish the lookout duty. It is more important for the safety of travelers at places like this that this duty should be observed than that the bell should be rung or the crossing gates closed, as the ringing of the bells and the closing of the crossing gates offer little pro-
308 tection to persons who thoughtlessly or carelessly go upon railroad tracks in front of approaching trains. The fact that such persons, heedless of the danger, go upon the tracks when bells are ringing and crossing gates are down is one of the reasons why the lookout duty is required and should be maintained. In short the chief purpose of the lookout duty is to protect the traveling public from the consequences of their own negligence. From the facts, we think it may safely be said that the fireman was negligent and that his negligence was the proximate cause of the injury, and that it was sufficient to authorize the verdict and judgment against the railroad company. But the question remains, was this negligence of such a character as to warrant a judgment against him. It is true his negligence consisted in his failure to perform a duty but it was more affirmative than negative negligence. He could and should have performed the duty of keeping a lookout. The duty of keeping a lookout was imposed upon him and did not depend upon what some one else or should have done but failed to do, or upon what some one else did not do but should have done, as was the case in

Cincinnati R. Co. v. Robertson, 115 Ky., 858, and Dudley v. Illinois Central R. Co., 127 Ky., 221. The facts resemble more the case of Ward v. Pullman Car Co., 131 Ky., 142, where the court in speaking of the negligence of the employees of a railroad company who were charged with the duty of inspecting cars and who had been joined as defendants in the action said—

“It is not a case of mere failure to act, but it is a case of one who was charged with the duty of seeing that the car was safe before delivering it to another to be used with actual knowledge that if it was unsafe it would endanger his life; for they must be charged with knowing what they should have known by the exercise of ordinary care when they made the inspection and passed the car. If they had not inspected the car at all, and had not approved the car in any way, they would have done no positive act, and a different question would be presented. We therefore conclude that, if they were the only defendants to the action, a recovery might be had against them under the allegations of the petition.”

And so in this case. The failure of the fireman to keep a lookout was more than mere nonfeasance. It was a breach upon his part of a positive duty enjoined upon him, and his failure to perform this duty was actionable negligence. If the engineer of a train fails to keep a lookout, and thereby injury results to a traveler, there can be no doubt that the engineer would be personally liable, and it is as much the duty of the fireman as it is the engineer to keep a lookout, and if he negligently fails to do so as in this case, his liability is the same as that of the engineer. Illinois Central R. Co. v. Coley, 121 Ky., 385.

310 The instructions are complained of, but we think they submitted fairly the only issue of fact involved in the case, which was, whether or not the persons in charge of the engine if they had been exercising ordinary care could have discovered the peril of Mrs. Banks in time to have prevented injuring her. It was correctly assumed by the trial court that Mrs. Banks was guilty of contributory negligence, but her negligence did not excuse the defendants if after discovering her peril they could have avoided injuring her, and this the jury found they could have done if they had been exercising ordinary care to discover her presence on the track.

Counsel insist that the instruction misapplied what is known as the “last clear chance rule”, but in reaching this conclusion counsel assumes the state of facts that are in dispute. If the facts assumed were admitted, then the criticism of the instruction would be correct. The “last clear chance rule”, is thus stated by counsel—

“If the plaintiff by his own negligence has put himself in a position of peril, and the defendant discovers his danger, or, by reason of some duty owing by him to the plaintiff, ought to discover it, and after that fails to exercise ordinary care to avoid the injury, then the defendant is liable notwithstanding this prior negligence of the plaintiff, because, having the last clear chance, or opportunity, to prevent the accident his negligence, and not that of the plaintiff, is regarded as the proximate cause.” If we should

311 accept this definition of the rule as correct, and hold that it was in force in this State—although it was expressly repu-

diated in *L. & N. R. Co. v. Trisler*, 140 Ky., 447,—we think there was evidence sufficient to justify the jury in finding and the court in rendering judgment that Mrs. Banks had negligently put herself in a position of peril but that the fireman if he had been keeping a lookout could have discovered her peril and after discovering it the fireman and engineer could by the exercise of ordinary care have avoided the injury.

Another objection is that the verdict, which was for five thousand dollars, was excessive; but we are not disposed to disturb the judgment on this ground. There is evidence that Mrs. Banks was at the time afflicted with tuberculosis, and the contention is that her death which occurred several months after the injuries were received was the result of this disease and not the injuries. On the other hand, there was evidence that she did not have tuberculosis and that her death was the direct result of the injuries. The issue of fact thus raised was for the jury and it was left to them under proper instructions to decide.

Another complaint is that the court erred in permitting J. F. Banks, the husband of Mrs. Banks, to testify as to her condition when he saw her at the Lexington hospital and afterwards; but there is no merit in this contention. *Aetna Life Ins. Co. v. Bethel*, 140 Ky., 609.

Perceiving no error prejudicial to the substantial rights of the appellant the judgment is affirmed.

Shelby & Shelby, Pendleton, Bush & Bush, for appellant.
Jouett & Jouett, A. Floyd Byrd, for appellee.

[Endorsed:] June 8, 1911. C. & O. Ry. Co. vs. Banks' Admr.

313 Be it remembered that on the 31st day of August, 1911, there was filed in the office of the Clerk of the Court of Appeals, a Petition for Writ of Error, and which is hereto attached and is as follows:—

314 Court of Appeals of the State of Kentucky.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
vs.

L. B. COCKRELL, as Administrator of the Estate of Celia A. Banks.

Deceased, Appellee.

Petition for Writ of Error.

The petitioner, Chesapeake and Ohio Railway Company, appellant herein, hereby sets forth that on or about the 8th day of June, 1911, the Court of Appeals of the State of Kentucky made and entered an order and judgment herein in favor of the appellee L. B. Cockrell, as Administrator of the Estate of Celia A. Banks, deceased, and against said petitioner, the appellant, which said order and judgment became final on the 15th day of July, 1911, upon

which day the mandate of said Court of Appeals was duly issued thereon; that in said order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition:

That the said Court of Appeals of the State of Kentucky is the highest court of the said State of Kentucky in which a decision in this suit and this matter could be had.

Wherefore, said petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 23rd day of August, A. D. 1911.

SHELBY & SHELBY,
PENDLETON, BUSH & BUSH,
Attorneys for said Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 29 day of August, A. D. 1911; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of seven thousand dollars (\$7000.00).

Dated at Frankfort, Kentucky, this 29 day of August, A. D. 1911.

J. P. HOBSON,

Chief Justice of the Court of Appeals of Kentucky.

Filed in my office this 31 day of August, A. D. 1911.

NAPIER ADAMS,

Clerk of the Court of Appeals of Kentucky.

[Endorsed:] C. & O. Ry. Co. vs. Celia A. Banks' Admr. Petition for writ of error. Filed Aug. 31, 1911. Napier Adams, C. C. A. Shelby & Shelby, Pendleton, Bush & Bush, Att'ys for Pl'ff in Error.

Be it remembered that on the 31st day of August, 1911, there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is hereto attached and is as follows:

Court of Appeals of the State of Kentucky.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
vs.

L. B. COCKRELL, as Administrator of the Estate of Celia A Banks,
Deceased, Plaintiff.

Assignment of Errors.

Now comes the said appellant, the plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judg-

ment of the Court of Appeals of the State of Kentucky in the above entitled cause there is manifest error in this, to-wit:

1. The said Court erred in holding and deciding that the Clark Circuit Court, from whose judgment this appeal was prosecuted to the said Court of Appeals, had committed no error in overruling, by its order of April 8, 1908, the motion of said plaintiff in error, which was one of the defendants in said Clark Circuit Court, to remove this cause into the Circuit Court of the United States for the Eastern District of Kentucky.

2. The said Court erred in holding and deciding that the said Clark Circuit Court had committed no error in overruling, by its order of April 24, 1908, the motion of said plaintiff in error to remove this cause into the Circuit Court of the United States for the Eastern District of Kentucky.

Wherefore, the said appellant, plaintiff in error, prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky, and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Court of Appeals of the State of Kentucky, and order and direct that the said cause be remanded to the Clark Circuit Court of said State of Kentucky, with directions to enter an order removing said cause to the said Circuit Court of the United States for the Eastern District of Kentucky, and to grant to the plaintiff in error all such other relief as may be proper.

Dated this 23rd day of August, A. D. 1911.

SHELBY & SHELBY,

PENDLETON, BUSH & BUSH,

Attorneys for said Plaintiff in Error.

[Endorsed:] C. & O. Ry. Co. vs. Celia A. Banks' Adm'r. Assignment of Errors. Filed Aug. 31, 1911. Napier Adams, C. C. A.

318 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme Court of the United States, and order allowing the writ and which is hereto attached, as follows: (A copy of which writ of error, with the said order endorsed thereon, is on file in said Clerk's office.)

319 THE UNITED STATES OF AMERICA, vs:

The President of the United States of America to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the Chesapeake and Ohio Railway Company, Appellant, and L. B. Cockrell, as Administrator of the Estate of Celia A. Banks, Deceased, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised

under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the Chesapeake and Ohio Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, 320 with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of September, 1911, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable, Edward D. White, Chief Justice of the United States, and the seal of the Circuit Court of the United States, for the Eastern District of Kentucky, at Frankfort, this the 26th day of August, A. D. 1911.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,

Clerk of the said Circuit Court.

Allowed by

J. P. HOBSON,

Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] Filed Aug. 31, 1911. Napier Adams, C. C. A.

321 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows:

322 Court of Appeals of the State of Kentucky.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,

vs.

L. B. COCKRELL, as Administrator of the Estate of Celia A. Banks,
Deceased, Appellee.

Bond

Know all men by these presents:— That we, Chesapeake and Ohio Railway Company, as principal, and National Surety Company

of New York, as surety, are held and firmly bound unto L. B. Cockrell, as administrator of the estate of Celia A. Banks, deceased, in the sum of Seven Thousand Dollars (\$7,000.00) to be paid to the said obligee, his successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

In testimony whereof we have hereunto subscribed our names and affixed our seals this 23rd day of August, A. D. 1911.

Whereas the above named, Chesapeake and Ohio Railway Company, hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

323 Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, but otherwise to remain in full force and effect.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

By JOHN T. SHELBY, *Attorney.*

NATIONAL SURETY COMPANY
OF NEW YORK,

By JOHN G. KING,

Attorney in fact.

324 STATE OF KENTUCKY,
Fayette County, set:

I, R. L. Northcutt, a Notary Public within and for the above named County and State, certify that on this day and in said County and State the foregoing instrument was produced to me, and was acknowledged by Jno. T. Shelby, attorney of the above named Chesapeake and Ohio Railway Company, for and on behalf of said Railway Company to be its act and deed, and was also acknowledged by John G. King, attorney in fact of the above named National Surety Company of New York, for and on behalf of said Surety Company to be its act and deed.

Given under my hand and official seal this 23rd day of August, 1911.

My Commission expires January 24, 1914.

R. L. NORTHCUTT,

Notary Public, Fayette County, Kentucky.

I hereby approve the foregoing bond and surety this 29 day of August, A. D. 1911.

J. P. HOBSON,

*Chief Justice of the Court
of Appeals of Kentucky.*

325 And on September 7, 1911, there was filed in the office of the Clerk of the Court of Appeals, the original Citation, with

proof of service endorsed thereon, and which is hereto attached as follows:—

26 UNITED STATES OF AMERICA, ss:

To L. B. Cockrell, as Administrator of the Estate of Celia A. Banks, Deceased.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of the State of Kentucky, wherein Chesapeake and Ohio Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 29 day of August, in the year of our Lord one thousand nine hundred and eleven.

J. P. HOBSON,
*Chief Justice of the Court
of Appeals of Kentucky.*

Attest:

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Copy of the above citation received, and service of said citation hereby acknowledged this 31st day of August, A. D. 1911,

JOUETT & JOUETT AND
A. F. BYRD,
Attorneys for Defendant in Error.

[Endorsed:] C. & O. Ry. Co. vs. Celia A. Banks' Adm'r. Citation. Filed Sep. 7, 1911. Napier Adams, C. C. A.

27 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the within Writ of Error I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case named in said writ of Error, with all things concerning same.

In witness whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, this the 7th day of September, 1911.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

328 Supreme Court of the United States, October Term, 1911.

No. 791.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,

v.

L. B. COCKRELL, as Administrator of the Estate of Celia A. Banks,
Deceased, Defendant in Error.

*Statement of Error on which Plaintiff in Error Intends to Rely,
and of the Parts of the Record which it Thinks Necessary for the
Consideration Thereof.*

The only error of the Court of Appeals of Kentucky on which Plaintiff in Error intends to rely is as follows, viz:

That said Court erred in holding and deciding that the Clark Circuit Court, from whose judgment an appeal was prosecuted to the said Court of Appeals of the State of Kentucky, had committed no error in overruling, by its order of April 8, 1908, the application of said Plaintiff in Error, which was one of the defendants in said Clark Circuit Court, to remove this cause into the Circuit Court of the United States for the Eastern District of Kentucky; and for the consideration of said error the said Plaintiff in Error thinks it is necessary to print only the following portions of the transcript of the record sent up by the Clerk of said Court of Appeals, viz:

The pages referred to are the manuscript pages of the record:

First. Caption of the record as sent up by said Clerk of the Court of Appeals of the State of Kentucky, page 1.

Second. Caption of the record as sent up by the Clerk of the Clark Circuit Court to said Court of Appeals, page 4.

329 Third. Memorandum of the filing of plaintiff's petition in the clerk's office of the Clark Circuit Court on the 24th day of February, 1908, page 4.

Fourth. Plaintiff's petition, page- 4-8.

Fifth. Summons issued to Clark County, page 8.

Sixth. Return of Sheriff of Clark County, page 9.

Seventh. Summons issued to Fayette County, page 9.

Eighth. Return of Sheriff of Fayette County, page 10.

Ninth. Order of Clark Circuit Court of April 6, 1908, filing petition and bond and noting motion of defendant, Chesapeake and Ohio Railway Company, to remove cause to Circuit Court of the United States for the Eastern District of Kentucky, page 10.

Tenth. Order approving bond for removal, page 10

Eleventh. Petition for removal, page 11.

Twelfth. Removal bond, page 15.

Thirteenth. Order of April 8, 1908, overruling motion to remove, page 16.

Fourteenth. Judgment of April 28, 1908, reciting verdict, page 35.

Fifteenth. Order of April 29, 1908, noting filing of grounds and making of motion for new trial, page 36.

Sixteenth. Motion and grounds for new trial, page 36.

Seventeenth. Order January 20, 1909, overruling motion for new trial and granting appeal, page 39.

Eighteenth. Judgment of Court of Appeals of the State of Kentucky of June 8, 1911, affirming judgment of Clark Circuit Court, page 287.

Nineteenth. Opinion delivered by Court of Appeals of Kentucky on June 8, 1908, pages 288-313.

Twentieth. Petition for writ of error, with allowance of same and endorsements thereon, pages 314-'15.

Twenty-first. Assignment of errors with endorsement thereon, page 317.

330 Twenty-second. Writ of error, with allowance of same, and endorsement thereon, pages 319-320.

Twenty-third. Writ of error bond, with approval thereof, pages 321-'22.

Twenty-fourth. Citation, with proof of service endorsed thereon, page- 325-'6.

Twenty-fifth. Return to writ of error, page 327.

Twenty-sixth. Clerk's endorsement on cover of transcript of record, and this Statement.

Dated 25th day of November, A. D. 1911.

JNO. T. SHELBY,
Counsel for Plaintiff in Error.

Service of copy of the foregoing statement is hereby acknowledged, this December 18th, 1911.

E. S. JOUETT,
Of Counsel for Defendant in Error.

331 File No. 22,867. Supreme Court U. S. October Term, 1911. Term No. 791. Chesapeake & Ohio Ry. Co., Pl'ff in Error, vs. L. B. Cockrell, Adm'r, etc. Statement of errors relied on and designation by counsel for plaintiff in error of parts of record to be printed, with proof of service of same. Filed December 19, 1911.

Endorsed on cover: File No. 22,867. Kentucky Court of Appeals, term No. 100. Chesapeake and Ohio Railway Company, plaintiff in error, vs. L. B. Cockrell, as Administrator of the Estate of Celia A. Banks, deceased. Filed September 22, 1911. File No. 22,867.

16
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 100.

CHESAPEAKE & OHIO RAILWAY
COMPANY, - - - - - **Plaintiff in Error,**

L. B. COOKRELL, as Administrator
of the Estate of Gelia A. Banks,
Deceased, - - - - - **Defendant in Error.**

BRIEF FOR PLAINTIFF IN ERROR.

JOHN T. SHELBY,
For Plaintiff in Error.

HENRY T. WICKHAM,
HENRY TAYLOR, JR.,
D. L. FENDLETON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 100.

CHESAPEAKE & OHIO RAILWAY COM-
PANY, - - - - - *Plaintiff in Error,*

VERSUS

L. B. COCKRELL, AS ADMINISTRATOR OF
THE ESTATE OF CELIA A. BANKS,
DECEASED, - - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The facts of this case so far as they serve to illustrate the single question presented to this court for its decision may be concisely stated as follows: Mrs. Banks, accompanied by some members of her family, was a passenger upon a west bound express train of the Chesapeake and Ohio Railway Company running from Ashland to Louisville, Kentucky. She left the train at Winchester in order to take another to her ultimate destination. The passenger station at Winchester is a short distance east of the place where Main Street, running north and south, crosses the railway track at a right angle. The

engine had stopped at a point from fifty to seventy-five feet east of the street. Mrs. Banks and her party alighted from the train on the south side and proceeded west along a concrete walk towards the street, it being their purpose to cross over the track to the north side to reach the other railway station from which to take a train to her home. The street crossing was provided with gates which were let down by a watchman so as to block it when a train was passing, and upon the gates were bells which rang as they were lowered. Before she reached the street, the train she had left, having discharged its passengers for that point, started on its way west and the gates were lowered at the crossing a few feet in front of her. She was by this time only a short distance west of the engine and a little east of the crossing, and instead of waiting for the train to pass, she stepped down upon the track in front of the moving engine with her back towards it and wearing an old fashioned sun-bonnet which covered her face. She was struck by the engine and rolled by it a distance of some forty feet, sustaining the injuries from which it is claimed she died some eight months afterwards.

This action was brought by her administrator in the Circuit Court of Clark County, Kentucky, against the plaintiff in error, the Chesapeake and Ohio Railway Company, a non-resident corporation, to recover the damages alleged to have been caused to her estate by her death, and the engineer and fireman, both residents of Kentucky, were joined as defendants. (Printed Record, pp. 1-3.)

On April 6, 1908, and in due season, the Railway Company filed its petition and bond and applied for a removal of the case to the United States Circuit Court for the Eastern District of Kentucky. (Pr. Rec., pp. 5-7.) This application was refused by the State Circuit Court on April 8, 1908 (Pr. Rec., p. 8), where a trial was had resulting in a verdict and judgment against the company for \$5,000.00, a directed verdict and judgment having been rendered in favor of the individual resident defendants at the conclusion of the plaintiff's evidence. The company prosecuted an appeal to the Court of Appeals of Kentucky, and from the judgment of affirmance there rendered, this writ of error is prosecuted.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows (Pr. Rec., p. 24):

1. The said court erred in holding and deciding that the Clark Circuit Court, from whose judgment this appeal was prosecuted to the said Court of Appeals, had committed no error in overruling, by its order of April 8, 1908, the motion of said plaintiff in error, which was one of the defendants in said Clark Circuit Court, to remove this cause into the Circuit Court of the United States for the Eastern District of Kentucky.

2. The said court erred in holding and deciding that the said Clark Circuit Court had committed no error in overruling, by its order of April 24, 1908, the motion of said plaintiff in error to remove this cause into the Circuit Court of the United States for the Eastern District of Kentucky.

The second assignment is explained by the fact that upon the return of the directed verdict in favor of the resident defendants, the railway company renewed its application for a removal of the case in view of the peculiar ruling of the Kentucky Court of Appeals upon the subject of removal.

We conceive, however, that it is clear, under the rule announced in *Whitcomb v. Smithson*, 175 U. S. 635, that a non-resident's right of removal must be determined in such cases as this from the record as made up on the original application, except, of course, in those instances where, though originally nonexistent, it may have been brought into being by the plaintiff's subsequent voluntary dismissal as to the resident defendants. For this reason we shall discuss only the questions presented by the first assignment, viz., upon the record as made up by the presentation of the removal petition on April 6, 1908 (Pr. Rec., p. 5), was the company entitled to a removal?

ARGUMENT.

It is admitted that the plaintiff's petition taking it as true, states a good cause of action against the resident defendants, and that under the law of Kentucky, it makes out a case of joint liability on the part of all the defendants. The proposition, however, is now too well settled to require the citation of authority that even in such cases if the averments of fact upon which the plaintiff predicates the charge of the joint liability of the resident

defendant be palpably untrue and the joinder made for the fraudulent purpose of depriving the non-resident defendant of the right to invoke the jurisdiction of the Federal Court, the right of removal will not be destroyed by the joinder of the resident. In other words, while a plaintiff, if he in good faith and reasonably believes to be true the facts upon which the joint liability depends, may unite joint tort-feasors as defendants, without regard to his motive in so doing, he will yet not be allowed to deprive a defendant of a right secured to him by the Constitution and laws of the United States by the averment of a palpably false state of fact made for the purpose of working such deprivation. *Wecker v. National Enameling, etc., Co.*, 204 U. S. 176, affords a notable example of the application of this rule.

It is equally well established that where a non-resident defendant in a petition for removal appropriately attacks as false and fraudulent the averments of fact upon which, in the plaintiff's petition the charge of joint liability is based, the allegations of the removal petition must, for the purpose of determining the right of removal, be taken as true by the State Court, and if the plaintiff desires to make an issue as to their truth, he must do this, not in the State Court, but in the Federal Court, which latter alone has jurisdiction to try such issue. And it follows as a necessary corollary from this proposition that, where admitting the averments of fact made in the removal petition to be true they make a proper case for removal, the application *ipso facto* works

the transfer to the Federal Court and deprives the State Court of its jurisdiction to proceed further:

Stone v. South Carolina, 117 U. S. 430.
 Carson v. Hyatt, 118 U. S. 279.
 Carson v. Dunham, 121 U. S. 421.
 Burlington, etc., R'y Co. v. Dunn, 122 U. S. 513.
 Crehore v. O. & M. R'y Co., 131 U. S. 240.
 Kansas City, etc., R'y Co. v. Daughtry, 138 U. S. 298.
 T. & P. R'y Co. v. Eastin, 214 U. S. 153.
 Illinois Cent. R'y Co. v. Sheegog, 215 U. S. 308, 316.

Notwithstanding the clearness with which this court has so often reiterated this rule, the Kentucky Court of Appeals in a series of cases, of which I. C. R. R. Co. v. Coley, 121 Ky. 385, and Dudley v. I. C. R. R. Co., 127 Id. 221, may be mentioned as illustrative, has held that even where the removal petition contains allegations which, if true, make a case for removal, yet the State court has the right "to inquire whether the facts alleged in the petition for removal be true," and that the time for it to relinquish jurisdiction and order the transfer is when, and if, upon the trial it be developed that the averments of plaintiff's petition upon which was predicated the right to join the resident defendant were falsely and fraudulently made. And this practice it adheres to in the opinion in the present case (Pr. Rec., pp. 16-17), although it was pointed out upon the argument there that Chief Justice Waite so far back as Burlington, etc., R'y Co. v. Dunn, *supra*, stated definitely the grounds upon which its rule was based as follows:

"The theory on which it rests is that the record closes so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the State Court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. * * *

"But, inasmuch as the petitioning party has the right to enter the suit in the Circuit Court [*i. e.*, the Federal Circuit Court], notwithstanding the State Court declines to stop proceedings, it is easy to see that if both courts can try the issues of fact which may be made on the petition for removal, the records from the two courts brought here for review will not necessarily always be the same. The testimony produced before one court may be entirely different from that in the other, and the decisions of both courts may be right upon the facts as presented to them respectively. Such a state of things should be avoided if possible, and this can only be done by making one court the exclusive judge of the facts. Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that, in our opinion, is more properly the circuit court."

In view of this it is respectfully submitted that the statement in the opinion of the Kentucky Court of Appeals in this case, that its decisions upon this point are not in conflict with those of this court (*Pr. Rec.*, p. 16), is explicable only upon hypothesis that that court has confused the rule announced in *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, with that applicable to the class of removal applications, to which the present be-

longs; and this, notwithstanding the caution given in the opinion in that case in these words (p. 218):

"It is to be remembered that we are not now dealing with joinders which are shown by the petition for removal, or otherwise, to be attempts to sue in the State courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals."

If we be correct up to this point, the only question to be answered here is whether the removal petition in the instant case contains averments which, taking them to be true, show that the allegations of fact upon which the plaintiff's petition predicates the liability of the resident defendants, Owens and Saunders, were falsely and fraudulently made.

It will be noticed at once that the plaintiff's petition nowhere makes in terms a charge of either joint or concurrent negligence; on the contrary, an easy analysis will show that it distinctly severs the defendants in its averments of neglect of duty. The charge is (Pr. Rec., pp. 2-3) that the railway company "through the gross negligence of its agents, servants and employes, and the defendants, Edward Owens and G. H. Saunders, through *their own* gross negligence, negligently failed" to do various enumerated things. In other words, Owens and Saunders, were guilty of their failure of duty through "their own" negligence, while the company was guilty

of its failure through the negligence of certain "agents, servants and employes," none of whom are designated by name, title or occupation, but who are evidently not Owens and Saunders. For, as it is the settled law of Kentucky that a master and the servant through whose only neglect a given injury occurred are, as respects the negligent act or omission of that servant, joint tortfeasors and may be jointly sued, under apt averments, in the same action, it can not be presumed that if the plaintiff's skilled and experienced counsel had meant to rest the liability of the company solely upon the neglect of Owens and Saunders, they would not have adopted the perfectly familiar form of alleging that all three defendants were jointly and negligently guilty of the enumerated failures of duty. Instead of this, the company's failure in respect of the specified duties is sharply differentiated from that of Owens and Saunders by the apparent effort to charge that as to the two latter it was "their own" negligence which caused the failure of duty, while as to the former it was certain undesignated "agents, servants and employes" whose negligence had given rise to a liability of the company other than, and in addition to, that which it was also under by reason of the alleged negligence of Owens and Saunders. In other words, the petition is skillfully drawn so that if the proof should fail to convict Owens and Saunders, and through them, the company of negligence, the latter might still be caught on the other prong of the fork, viz., the negligence of some other employe. As will be seen from the opinion of the Court of Appeals, the trial

developed the fact that Owens, the engineer, could not by any possibility have seen the act of Mrs. Banks when she suddenly stepped in front of his engine, and that the fireman, Saunders, was engaged in watching the rear of the train, so as to give immediate notice to the engineer of any danger arising from the frequent habit of persons jumping on or off just as it was starting—a duty which might well be regarded as paramount to that of watching the front, in view of the warning against going on the track afforded to persons in Mrs. Banks' position by the action and noise of the crossing gates in front of her and the bell and other sounds from the approaching train behind her. It is, therefore, well within the range of the possible that the able counsel for plaintiff in preparing their petition may have anticipated that the trial judge might take that very view of the question as to negligence on the part of the engineer and fireman which is implied in his direction of a verdict in their favor; in which event it would be absolutely necessary for them to fall back upon the theory that the company was guilty of some other failure of duty as to warning and lookout than that charged against these two employees—such, for instance, as a failure on the part of the street crossing watchman to give adequate warning or a failure of the management to provide, under the circumstances, other means of lookout from or near the engine than what was possible to the engineer and fireman.

Considering now the question of the sufficiency of the removal petition in the light of these suggestions, it is apparent, first, that we have not here a case where the

railway company is sought to be made liable solely by reason of the acts or omissions of its employees, who are united as co-defendants, and where the negligence and consequent liability of the employer is dependent solely upon that of those employees, but one where the liability might, on the trial, be cast upon the former, under the averments of the petition, even if the latter were acquitted; and, secondly, that the duly verified removal

petition, in express terms, avers that each of the charges of negligence, (naming them specifically), made against the resident defendants is "false and untrue and known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue and . . .

made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder of said Owens and said Saunders with this petitioner in this action, and for the purpose of thereby fraudulently depriving this petitioner of its right under the Constitution and laws of the United States to have this action removed into the Circuit Court of the United States for the Eastern District of Kentucky, and that neither of said allegations as to either said Owens or said Saunders can be sustained by the plaintiff on the trial of this action."

The removal petition, therefore, by appropriate averment, affirmatively attacked as false and fraudulent the alleged state of fact upon which was based the charge of any actionable negligence whatever on the part of the resident defendants; and so, if it be taken as true, the record thus made up presented a case where there was

but one real defendant, the railway company, and but one real controversy, that between it and the plaintiff; which controversy the real defendant was entitled by reason of the diversity of citizenship to have submitted for decision to the Federal Court.

It may not be irrelevant here to point out in advance of any possible claim to the contrary, that this conclusion is in no way affected by the decision of this court in *Illinois Cent. R. Co. v. Sheegog*, 215 U. S. 308. There the plaintiff had joined with the Illinois Central Railway Company, the real defendant, and a non-resident, one of its conductors, a resident of Kentucky, and also the Chicago, New Orleans & St. Louis Railroad Company, a Kentucky corporation and the owner of the railroad in question, which was operated by the Illinois Central as its lessee. The opinion considers the question of removal only as it was affected by the joinder of the lessor corporation; because if it had been properly joined, this, in itself and without regard to the conductor, was sufficient to prevent a removal. Under the rule established in Kentucky, a lessor corporation was jointly responsible with its lessee for an accident occurring in the operation of the leased railway caused by a failure to properly maintain the track; and the plaintiff's petition alleged that the accident occurred by reason of a defective roadbed which condition was due to the joint negligence of both companies. If the accident was caused by a negligently defective roadbed, it, of course, followed as a matter of law that the lessor corporation was jointly liable with its lessee for the accident. The removal

petition admitted the lease and did not attack as false the allegation that the accident was caused by the negligently defective roadbed; but attacked as false and fraudulently made only the charge that it was through the *joint negligence* of the two companies that the defect existed. It was held, therefore, that as the averment of fact on which the liability of the lessor was predicated, i. e., that the accident was caused by negligence in the maintenance of the roadbed, was not attacked as false and fraudulent, but only the charge that this negligence was the *joint negligence* of both companies, the averments of the removal petition amounted to no more than an attempt by the "mere epithet 'Fraudulent' " to challenge a conclusion of law and were insufficient to work a removal. This, of course, is not the case here, where the removal petition attacks as false and fraudulent the whole foundation of fact upon which the liability of the resident defendants is rested.

A reversal of the judgment of the Kentucky Court of Appeals with proper directions is respectfully asked.

JOHN T. SHELBY,

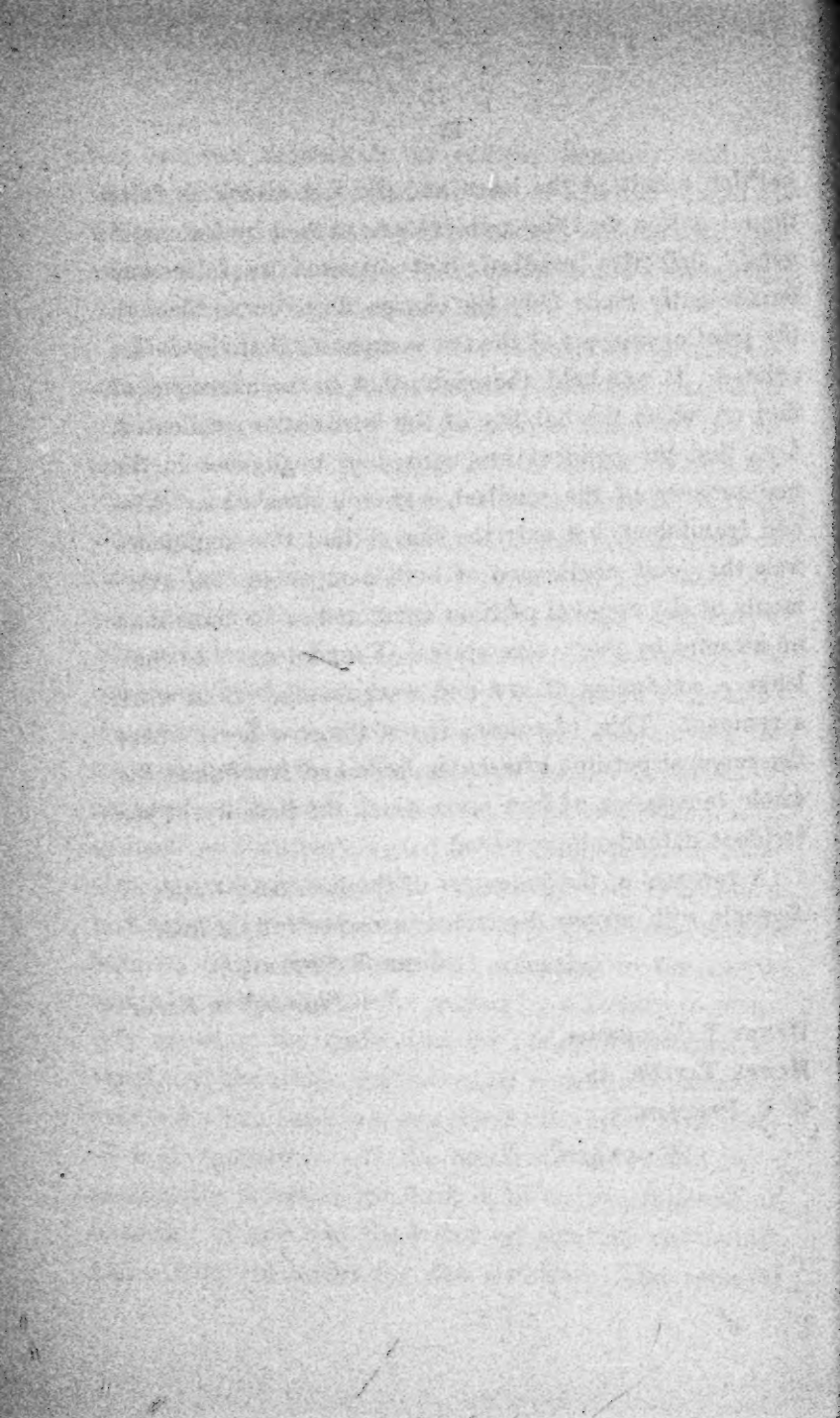
For Plaintiff in Error.

HENRY T. WICKHAM,

HENRY TAYLOR, JR.,

D. L. PENDLETON,

Of Counsel.



SYNOPSIS.

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Supreme Court of the United States

CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error*,
versus

L. B. COCKRELL, ADMR., - - - *Defendant in Error*.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought in a Kentucky state court by the administrator of Celia A. Banks, deceased, a citizen of Kentucky, against the Chesapeake & Ohio Railway Company, a citizen of Virginia, and Edward Owens and G. H. Sanders, citizens of Kentucky, the resident defendants being respectively the engineer and fireman engaged in operating their co-defendant's engine at the time it ran over and killed plaintiff's decedent at a street crossing in Winchester, Ky.

The non-resident defendant filed its petition for removal alleging fraudulent joinder. The Clark Circuit court held the removal petition insufficient and refused to remove the case. The trial proceeded and resulted in a verdict and judgment for plaintiff for \$5,000, which upon appeal to the Court of Appeals of Kentucky was affirmed.

Note: The italics in this brief are ours.

This writ of error is brought to review the action of the Kentucky courts in declining to surrender jurisdiction to the Federal court.

STATEMENT.

Some knowledge of the facts being necessary to an intelligent understanding of the questions in this case we will adopt the brief statement given in the opinion of the Kentucky Court of Appeals (Rec. 17):

The Historical Facts.

“In April 1907, Celia Banks, a woman about forty-five years of age, accompanied by her son, her
 302 father-in-law and other members of her family, arrived at Winchester, a city of several thousand population, on the morning express train from Ashland, Kentucky. The appellant railroad company’s main line at Winchester runs east and west, and its passenger station is about a square east of Main Street, which is the principal thoroughfare of the city and crosses the railroad at right angles. This street is reached from the station by a concrete walk adjoining the track. Passengers arriving on trains use this concrete walk to Main Street; and, if they desire to go into the northern part of the city, they cross defendant’s track at Main Street. The train from which Mrs. Banks alighted, stopped a few minutes at Winchester for the pur-

pose of receiving and discharging passengers, and then started on its journey west and towards Main Street. Mrs. Banks and her party, after leaving the train, walked down the concrete walk to Main Street, and, desiring to go into the northern part of the city, they started across the track. About the time Mrs. Banks reached Main Street the train started, and when it had traveled a few feet and acquired a speed estimated at from two to five miles an hour, Mrs. Banks stepped from the concrete walk on to the track in an effort to cross it. She wore a sun-bonnet, and her back was at least partly to the engine, and when she had taken a few steps from the concrete walk towards the track she was struck

by the engine, and rolled by it on the side of
 303 the track until she reached the middle of
 Main Street, some forty feet distant from
 where she was struck. At this point she was run
 over by the wheels of the engine, which cut off one
 leg and inflicted other serious injuries, from which
 she died."

Legal Sufficiency of Petition for Removal the Real Question.

Counsel for plaintiff in error assert that the only question here to be decided is whether or not the petition for removal was sufficient to operate as a removal of the case to the Federal Court. We assume for the purposes of this argument that he correctly states the ques-

tion. It will be observed that the Kentucky Court of Appeals in its opinion does not directly discuss the sufficiency of the petition for removal, but rests its decision upon the proposition that the State court has the right to determine for itself the issues of fact raised by the petition for removal in those cases, as here, where the Federal Court would not in the first instance have jurisdiction, that is, where there is a joint action against several defendants, one or more of whom are citizens of the same state as the plaintiff.

There is much force in its position as an original proposition, and we are not sure that the distinction between such cases and those where the Federal Court had jurisdiction in the first instance, has ever been expressly considered by this court. We do not, however, rely upon this position of the Kentucky court, but assuming, for the sake of this argument, that in both classes of cases this court holds that issues of fact raised upon the removal petition must be tried in the Federal Court, after removal, we assert, as was decided by the Kentucky trial court, that the petition for removal here involved, considered in connection with the plaintiff's petition, the two making up the record, did not state facts sufficient to show a fraudulent joinder, and hence work a removal of the case.

Plaintiff's Petition.

It will be remembered that all the decisions of this court leave to the state court the right to pass upon the sufficiency of the removal petition, at the peril of a re-

versal by this court, if it decides erroneously. In testing the sufficiency of the removal petition it is not every allegation of fact therein that is material or effective in making a removable case. Then, too, it must be considered in connection with the plaintiff's petition—in other words, the State court can and must decide the question upon the face of the record as made up when the removal petition is filed.

In order that the court may readily see the state of the record which had to be considered by the trial court upon the filing of the petition for removal, we will quote that portion of the plaintiff's petition that sets out the negligent acts of the defendants, of which plaintiff complains, (Rec. 2):

7 “Plaintiff says that as his said decedent was thus attempting to cross said track defendant, the Chesapeake & Ohio Railway Co., through the gross negligence of its agents, servants and employes and the defendants, Edward Owens and G. H. Sanders, through their own gross negligence, negligently failed to provide, maintain and keep an adequate and sufficient lookout ahead of said train at the time said decedent went upon said track and was run over, and negligently failed to provide, maintain and keep any outlook at all upon the left or south side thereof; and negligently failed to give any signal or warning of the starting or approach of said train, and negligently ran said engine and cars upon and over said decedent and crushed and bruised, cut and

mangled her head, body and limbs to such an extent that one of her legs above the knee had to be and was immediately amputated, and she was otherwise horribly crushed, injured and bruised so that on December —, 1907, she died from the injuries thus sustained.

“Plaintiff says further that the place at which his said decedent attempted to cross said track as aforesaid was very near to and about Main Street, which is a public highway, and the most frequently traveled thoroughfare in Winchester, and that in addition to the negligence above set out the defendants were also grossly negligent in this: that after said decedent was struck by said engine she was pushed and rolled by the engine on to said street and upon and partly across said street from about its east margin to about the center of same, a distance of about — feet before she was run over or materially injured;

and he says that but for the gross negligence
 8 of defendants they could have seen plaintiff in time to have stopped before striking her; and after striking her and after she had been pushed by the engine to the east margin of Main Street, they could still, but for their gross negligence, have stopped said train, which was at the time moving very slowly, before it ran over or materially injured her, but that instead of stopping in order to save her life, which they could easily have done, they were grossly negligent in that they continued to run said engine forward until it had passed over her body

about the middle of said street and injured her as above set out."

The specific statement is then made that "all of the acts and omissions herein complained of were due to and caused by the gross negligence of the defendants."

The Petition for Removal.

The petition for removal does not deny any of the acts or omissions charged in the plaintiff's petition, but merely sets out *seriatim* plaintiff's various charges of negligence and at the conclusion of the recapitulation states that each of them is false and untrue, was so known, or could have been known by the exercise of ordinary diligence, by the plaintiff, and that they were made for the fraudulent purpose of affording a basis for the joinder of the two resident defendants with the petitioner in order to prevent a removal of the case to the Federal court. An examination of the petition for removal, however, will show that there was no denial of the fact that no lookout ahead on the south side of the train was being maintained at the time the decedent went upon the track and was run over, though the concrete walk that extended along the track westward to Main Street, and upon which decedent and others were walking, was on that side and Main Street was immediately ahead. There was no denial that the defendants ran the engine and cars upon and over the decedent, cutting off one of her legs and otherwise so injuring her that she died shortly thereafter; and no denial that after the decedent was struck

defendant continued to run said engine forward, rolling her on the outside of the track for 40 feet until finally the engine passed over the decedent's body about the middle of the street, all of which could have been prevented if there had been a lookout. There was no denial of all or any of the acts or omissions specifically set out in the petition, but merely a denial that they were done or omitted to be done negligently.

The petition for removal does not state a single extraneous fact in anywise bearing upon the case, either as evidence of fraud or for any other purpose. Its effect is simply to traverse so much of the allegations of the petition as charge that the admitted acts and omissions were negligent, with the added statement that the plaintiff knew that the allegations of negligence were untrue.

ARGUMENT.

We come then to the real question, whether the face of the record showed the non-resident defendant to be entitled to a removal. As stated above, by record is meant not merely the petition for removal, but it and plaintiff's petition taken together. In *Crehore v. O. & M. R'y Co.*, 132 U. S. 240, this court speaking through Justice Harlan said:

"A State court is not bound to surrender its jurisdiction until a case has been made which on its face shows that the petitioner has the right to transfer."

In *Stone v. State of South Carolina*, 117 U. S. 430, the court said:

"A State court is not bound to surrender its jurisdiction of a suit on a petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the circuit court begins."

See also *Louisville & Nashville R. R. Co. v. Wanglin*, 132 U. S. 599. *Alabama Southern Railway Co. v. Thompson*, 200 U. S. 206. *Carson v. Heatt*, 188 U. S. 279.

If the resident defendants, or either of them, were legally joined as co-defendants with the Railway Company, then there was not a separable controversy and the fact that one or more of the defendants was a resident of the same State as the plaintiff forbade the removal. If, however, it appeared from the petition for removal that in joining them the plaintiff had perpetrated a fraud, that is, had joined the two resident defendants with the non-resident defendant by fraudulently alleging certain facts essential to a legal joinder, which the plaintiff knew to be false but made for the fraudulent pur-

pose of supporting the joinder to prevent a removal, then the case should have been removed.

The Plaintiff Had the Right to Sue the Three Defendants in a Joint Action.

This court has considered so many cases from Kentucky similar to this that it would ordinarily seem unnecessary to discuss the right of plaintiff to sue the three defendants in one joint action. This is permitted by Section 241 of the Constitution of Kentucky, which provides that in case of death by negligence or wrongful act "damages may be recovered for such death from the corporation or persons so causing the same." Then Section 6 of the Kentucky Statutes provides that in case of death caused by negligence "damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, *their agents or servants*, causing the same."

The Court of Appeals of Kentucky has repeatedly decided that a joint action could be maintained against the corporation and the agent whose negligence constituted the negligence of the corporation. *Pugh v. C. & O. R'y Co.*, 101 Ky. 77; *Rutherford v. I. C. R. R. Co.*, 27 K. L. R. 397; *Jones v. I. C. R. R. Co.*, 26 K. L. R. 31; *I. C. C. R. Co. v. Coley*, 28 K. L. R. 336; *Cent. Pass. R'y Co. v. Kuhn*, 86 Ky. 578.

This identical question was considered by this court in the leading case of *C. & O. R'y Co. v. Dixon*, 179 U. S. 131, which was a suit also against the Chesapeake & Ohio

R'y Co. and its engineer and fireman for the death of Dixon, who was run over and killed while crossing defendant's tracks. In that case the court said that "the contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part of all the defendants, but counted *merely upon the negligence of the employes.*" To this the court replied:

"The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And on the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its co-defendants, being its employes, could not. At all events, a judgment against all could not afterwards be attacked for the first time on this ground."

The court concluded by holding that all three defendants "were jointly liable for the destruction of the life of Dixon."

The same question has been considered in several later cases in this court, notably *C., N. O. & T. P. R'y Co. v. Bohon*, 200 U. S. 221. That was a suit for the death of a brakeman. The action was brought against the railway company and the engineer engaged in operating the engine that ran over and killed him. This court, after reviewing the provisions of the Kentucky Constitution and Statutes and numerous decisions, thus stated its conclusion:

"We then have a case in which the extent of the right to recover damages for negligence is prescribed by the Constitution and Statutes of the State of Kentucky, and which the courts of that State have construed to give a joint cause of action against the corporation and its agents or servants causing the same."

And again the court said:

"We have under consideration an action for tort which by the Constitution and laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries."

The same doctrine has been adhered to in the recent case of *Illinois Central R'y Co. v. Sheegog*, 215 U. S. 308, which was also a Kentucky death case, where the lessor and also the conductor of the non-resident company were joined as defendants.

All doubt, however, is set at rest by this express admission of counsel for plaintiff in error in his brief. (Brief, 4):

"It is admitted that the plaintiff's petition, taking it as true, states a *good cause of action against the resident defendants*, and that, under the law of Kentucky, it makes out a case of joint liability on the part of all the defendants."

Such full reference to this question of the joint liability would have been unnecessary, except for the appre-

hension that the court might misunderstand the purport of the argument presented by counsel for plaintiff in error at pages 8, 9, 10 of his brief. He there undertakes to show that the negligence of the corporate defendant might have been due, at least in part, to the negligence of other employes than Sanders and Owens. He works this out by what can surely be considered as little less than a play upon the two phrases, "through its agents, servants and employes" following the name of the Railway Company, and "through their own negligence" following the name of the engineer and fireman. Building upon this alone, counsel asserts that the "agents, servants and employes" whose negligence constitute the negligence of the company "are evidently not Owens and Sanders." (Brief, 10.) He then suggested that what the pleader possibly meant was that the negligence of the company was "a failure on the part of the street-crossing watchman to give adequate warning or a failure of the management to provide under the circumstances other means of looking out from or near the engine than what was possible to the engineer or fireman."

This remarkable refinement is offered in spite of the fact that plaintiff's petition discloses no suggestion of any other individual being responsible for the killing of Mrs. Banks than the enginemen, Owens and Sanders, and no intimation that the negligence complained of related to anything else than the running of the engine and train of cars. There could surely be no misunderstanding as to what acts and whose negligence are complained of in this petition. The two phrases mentioned did occur once

in the earlier part of the petition, but they were at most mere surplusage, as the allegation of negligence on the part of the corporate defendant necessarily meant through its agents, servants and employes, while negligence on the part of individuals necessarily meant their own personal negligence, as it was patent from the petition that they had no agents working for them whose negligence could be attributed to them. We confess our inability to understand the relevancy of this point made by the distinguished counsel for plaintiff in error, for, as heretofore quoted, he distinctly admits that the petition states "a good cause of action against the resident defendant," and also admits "that under the law of Kentucky it makes out a case of joint liability on the part of all the defendants." Whatever may be the purpose, however, of the suggestion, it is perfectly manifest that the plaintiff, not having contented himself with the general allegation of negligence, but having undertaken to set out specifically the particular negligence complained of, was confined in this case to the negligence of the engineer and fireman. But suppose the petition had contained specific charges of negligence against the railway other than the negligence of the engineer and fireman, that could not affect the question, for the negligence of these enginemen would still be the negligence of the company, and hence to the extent that they are denied in the removal petition, it would be a denial of the negligence of the principal defendant. It is true that the adjectives, "joint and concurrent," suggested by counsel are not used in the petition in describing the negligence,

but they are wholly unnecessary under the repeated decisions of the Kentucky Court of Appeals, and of this court, that the facts alleged constitute joint negligence and authorize the joining of the employer and the employe in the same action. It may be noted here in support of our previous remarks on this question that in the case at bar the Court of Appeals of Kentucky, which alone had the right to determine whether this was a joint action with the defendants legally joined, held that it was "a good joint cause of action against all of them."

**Does the Petition for Removal Allege Facts that
Constitute a Fraud?**

Briefly summarized, the plaintiff alleges that the non-resident Railway Company and its two resident employes joined as defendants caused the death of his decedent by negligently running an engine over her at a street crossing, the particular negligence emphasized being the fact that the trainmen failed to keep a lookout as the engine approached the Main Street crossing. We have seen that the petition for removal does not deny any of these facts and that it states no extraneous fact showing fraud or otherwise bearing upon the events described in plaintiff's petition. It is not claimed that any person other than the two enginemen participated in these occurrences. The only thing alleged in the petition as the basis of the pleader's conclusion of fraudulent joinder is that the defendants were not negligent and that plaintiff knew or ought to have known that they

were not negligent. The use of the harsher term "false" in referring to plaintiff's charge of negligence in connection with the admitted facts and admissions of defendant is no stronger in law than a simple denial of negligence. And the added allegation that the plaintiff knew or should have known that these admitted acts and omissions of defendant were not negligent is not the allegation of a fact which constitutes a fraud. Understanding, as this court does, that acts and omissions of the kind here described are constantly and customarily considered negligent by intelligent men, it is manifest that the condition of plaintiff's mind as to this disputed negligence is immaterial in any view of the case and particularly that it falls short of being evidence of fraud. In fact, *knowledge* that acts of the sort here involved are or are not negligent is not an appropriate term. No man can say that *he knows certain acts to be negligent* in the sense that he *knows facts*, as, for example, that he did a certain thing or made a certain statement. At best, one can only have an opinion as to what constitutes negligence and different men will have different opinions. Hence the charge in the petition for removal that plaintiff knew or must have known that defendants were not negligent is an idle statement which falls far short of being evidence of actual fraud.

Negligence is itself a conclusion of law resulting from certain facts, and knowledge of negligence is a confusion of terms. Necessarily, then, the trial court properly held that the statement in the petition for removal did not reach up to the allegation of *facts* which this court

has so uniformly required in order to support the charge of fraudulent joinder.

Instead of affirmatively showing fraud the legal effect of the language of the petition for removal is merely a denial of the negligence of Sanders and Owens. This, however, is the very issue to be determined by a jury at a trial upon the merits. In other words, if the position of plaintiff in error is sound, then when the case was removed to the Federal Court and the allegations of the petition for removal were traversed, that court would have been called upon to try the exact issues that would have ultimately been presented to the jury itself.

Recall that the allegation of the petition for removal is that each and every charge of negligence in the plaintiff's petition is untrue. Upon that issue each side would naturally produce all the witnesses and offer all the other evidence that it would expect to have considered upon a trial on the merits, for the question to be decided—namely, the negligence, whosoever it might legally be, involved in the acts of Owens and Sanders—is practically the only issue to be tried except that in the trial upon the merits there would be in addition the assessment of damages, while on the trial of the petition for removal there would be the additional question whether, even if there was an absence of negligence, the plaintiff knew it.

Another controlling reason for holding that the allegation of the removal petition did not show fraudulent joinder is that, if allowed, it would destroy plaintiff's claim against the non-resident defendant itself, for the

very facts relied upon to hold the non-resident defendant are these acts and omissions of the engineer and fireman, the resident defendants. If the charge of negligence against them is fraudulent then that against this railway is also fraudulent.

Principle and authority support these positions. Remember that the first allegation of the removal petition is in effect a mere denial of negligence. It is the second upon which defendant relies, that plaintiff knew the engineer and fireman were not negligent. It is a strange doctrine that would enable a non-resident defendant to defeat the jurisdiction of the tribunal primarily authorized to try the case by merely adding to the denial of liability the allegation that plaintiff must have known that there was no liability. If this doctrine be established, then every suit of this sort, no matter how plain the case or the joint liability (and no plainer one can be imagined than the one at bar), can be removed with the stroke of a pen, if the defendant be willing to deny the plaintiff's claim at all, for it would require no stretch of the conscience to add the statement that plaintiff knew that he had no case. In other words, if the defendant can assert that plaintiff's claim is bad, he can just as easily and consistently (in view of the plaintiff being presumed to know the real facts) say that plaintiff knows that it is bad, and he would, in practice, never hesitate to put in that additional word. And it would make no difference to him, as it makes no difference in law, whether he set out each allegation of

negligence specifically and said that each was untrue and known so to be to the plaintiff, or bunched them all together and merely stated that all the allegations of negligence were untrue and known so to be.

We are, as stated, not without authority on these questions, though cases exactly analagous are, for manifest reasons, rare. To begin with, it is a familiar principle now that the mere allegation that the joinder is fraudulent, no matter how positively it be asserted, is wholly insufficient.

In the late case of *Illinois Central R'y Co. v. Sheegog*, 215 U. S. 308, a death case, in which a resident lessor and a resident conductor were joined with the non-resident Railway Company, the court said:

"In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern R'y Co. v. Thompson*, 200 U. S. 206. *Cincinnati, New Orleans & Texas Pacific R'y Co. v. Bohon*, 200 U. S. 221."

In *Chesapeake & Ohio R'y Co. v. Dixon*, 179 U. S. 135, the court said that "plaintiff's motive in the performance of a wrongful act was not open to inquiry."

In *Chesapeake & Ohio R'y Co. v. McCabe*, 213 U. S. 215, the court held "that the averment in the petition for removal that the joinder was fraudulent goes for nothing in the absence of a show of facts which makes such joinder fraudulent in fact."

In the late case of *C., R. I. & P. R'y Co. v. Schwyhart*, 227 U. S. 184, the court in discussing the charges in the removal petition that were claimed to establish fraudulent joinder said:

"Again the motive of the plaintiff taken by itself does not affect the right to remove. If there is a joint liability he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right."

See also *C., B. & Q. R. Co. v. Willard*, 220 U. S. 413.

Apropos to our statement above that the allegations of the petition for removal in the case at bar amount merely to a denial of any cause of action against the resident defendants, we call attention to the language of this court in *Chicago, R. I. & P. R'y Co. v. Schwyhart*, *supra*, a personal injury suit against a non-resident railway company, with which was joined its employe, a resident defendant. A petition for removal was filed charging that the resident defendants were joined for the sole and fraudulent purpose of preventing a removal. One of the grounds stated was that no cause of action was stated against Barrett—in effect the same ground relied upon in this case. Considering that ground, the court said:

"The remaining justification for the charge of fraudulent intent is that no cause of action was stated against Barrett (the resident defendant). That again is a question of State law and that the plaintiff had such a cause of action in fact must be taken now to be established. * * * On the question of removal we have not to consider more than whether there was *a real intention to get a joint judgment and whether there was a colorable ground for it shown as the record stood when the removal was denied.*"

Could a case be imagined which, under the admitted facts, measures up to both these requirements more fully than the one at bar.

This court has thus by repeated decisions declared the rule to be that in order to effect a removal, the petition therefor must set out specifically *the facts which constitute the fraud in fact*. It is easy to imagine illustrations to which the rule will apply. For example, in the case at bar, the petition for removal would have been good if it had alleged that Owens and Sanders were not the enginemen but were brakemen on the train in question, who were not on the engine at the time the plaintiff's decedent was hurt, and that the plaintiff knew those facts when he brought his suit, yet falsely claimed that they were present and running the train in order to get some resident trainmen as defendants, for the purpose of holding jurisdiction in the State Court.

When this rule became well known, those non-resident

defendants who desired to exercise a choice of forums, (but were unwilling to grant the same right to the plaintiffs) cast about for some other way by which to make the allegations of fraudulent joinder good and defeat the jurisdiction of the State courts. They accordingly adopted the plan of asserting in the removal petition that all the allegations of negligence were false, even though generally forced to admit the performance of the acts claimed to be negligent. We do not mean to suggest that this was morally wrong, for, as above indicated, the defendant nearly always can, or thinks he can, truthfully deny negligence, and, if so, an additional allegation that the plaintiff must have known that there was no negligence follows as a matter of course.

ILLINOIS CENTRAL R'Y CO. V. SHEEGOG, 215 U. S. 308.

Perhaps the first case of this sort is *Illinois Central R'y Co. v. Sheegog*, 215 U. S. 308. That was a suit in a Kentucky State court to recover damages for the death of the engineer of an Illinois Central train. Two resident defendants were joined, a Kentucky corporation which owned the railroad and had leased it to the Illinois Central, and one Durbin, a resident of Kentucky, who was conductor on the train. The petition for removal averred that the allegations showing joint liability between the lessor company and the lessee company were false and known to be so and, in a like manner, that the allegations of negligence on the part of the conductor were false and known to the plaintiff to be false, and that they were made solely for the fraudulent purpose of pre-

venting the removal of the case to the Federal court. The language of the petition for removal with reference to both the lessor company and Durbin, the conductor, we quote here, from the record of the case in this court, as throwing no little light upon our case, since the Kentucky Court of Appeals affirmed the action of the trial court in refusing to surrender the jurisdiction because the petition for removal was insufficient, and this action of the Court of Appeals was in turn affirmed by this court. The petition is as follows:

“Your petitioner says that to avoid such removal to the Federal court of this action, plaintiff joined your petitioner’s co-defendants, one a Kentucky corporation, and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was through joint and gross *negligence and carelessness of all the defendants derailed and said decedent instantly killed*, and falsely and fraudulently alleged that by the negligence of both of defendants’ road-bed, rails, track, cattle guards, fences, and right-of-way of the said railroad were allowed to be and for a long time had been, in a weak, rotten, ruinous, defective and improper condition, and by the *negligence* of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and *that this improper and dangerous condi-*

tion of the road, premises and cars of the defendants was known to the defendants, and that at the time of the wreck and accident the same were being operated in a careless manner by all of the defendants, and the defendant, Durbin, by his negligence in running, ordering and directing said train contributed to cause said accident, and that the negligence of the defendant in its maintenance of its track, road-bed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with the negligence of your petitioner in directing and permitting its engine, cars and road-bed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions altogether caused said wreck, and killed said decedent, when the plaintiff well knew that such allegations were untrue, and plaintiff did not expect to establish allegations, and did not make them for the purpose of proving them at the trial or of substantiating his cause of action therewith, but made them solely for the purpose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal court."

It is manifest that the substance of this is a mere denial of the petition on its merits, and particularly of the negligence of defendants.

Anticipating our probable reference to this case, the

counsel for plaintiff in error insisted in his brief that one of the principal efforts in the Sheegog case was to show that the lessor company (a Kentucky Corporation) was not liable, and hence was fraudulently joined. That is true so far as it goes, but the court even on that branch of the case reasons along the lines we are now suggesting. It remarked that since under the Kentucky law the lessor company could be held liable in a suit for tort solely because of a tort of the lessee company, to show that the lessor was fraudulently made a party would be to show that the lessee itself was fraudulently sued upon trumped up allegations which the plaintiff knew to be false and did not expect to prove. In rejecting the petition the court said:

“The only way in which fraud could be made out would be by establishing that the allegation of a *cause of action against the Illinois Central Railroad was fraudulent*, or, at least, any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of Federal jurisdiction.”

The petition for removal in that case was, as we have seen, practically identical with the instant one in specifically setting forth practically every material allegation of negligence in the original petition, and alleging that each was false, was known so to be by the plaintiff, and was made for the fraudulent purpose of defeating re-

moval. The statements, in fact, are more strongly put than in the petition for removal in the present case.

Pursuing the same line of thought the court further said:

“We have assumed, for purposes of decision, that the railroad, held on what may be called a secondary ground, is to be charged, if at all, only as a consequence of the liability of its lessee. But when we come to the principal and necessary defendant, a man is not to be prevented from trying his case before that tribunal that has sole jurisdiction, if his declaration is true, *by a mere allegation that it is fraudulent and false. The jury alone can determine that issue*, unless something more appears than a naked denial.”

This court thus held that the allegations of the removal petition that the plaintiff's specifically enumerated charges of negligence set forth were each false, were known to be so, and were made to fraudulently defeat removal, were in effect “naked denials,” and hence unavailing as allegations of facts constituting fraud that would authorize removal. It accordingly affirmed the action of the State Court in refusing to surrender jurisdiction.

In our case the acts and omissions complained of as the basis of the suit were those of the two resident defendants, the engineer and fireman. The non-resident corporation defendant was liable, if at all, only if the acts of these two employees, or either of them, were negli-

gent. Manifestly the allegations that these acts were not negligent are equivalent also to a denial that the non-resident defendant itself is liable; but, as said in the last quotation above, this is the issue for the jury to try.

ENOS V. KENTUCKY DISTILLERIES & WAREHOUSE COMPANY,
189 FED. 342.

This case, also a Kentucky case and practically on all-fours with ours, was recently decided by the Circuit Court of Appeals for the Sixth District.

Enos was an employe of the Kentucky Distilleries & Warehouse Company, a New Jersey Corporation, and lost his life by falling through an elevator shaft, from which the elevator had been temporarily removed. At the time of the accident decedent was engaged at the opening of the shaft upon the fifth floor in fastening a tackle to barrels, preparatory to lowering them to the basement by means of a block and tackle operated by the workmen upon the sixth floor. The guard rails, which had surrounded the elevator opening on the fifth floor, were taken away when the elevator was removed, and a plank was left across the opening of the shaft, which, in some way, fell through the opening to the bottom of the shaft at the time Enos fell. Suit was brought against the Kentucky Distilleries & Warehouse Company, a New Jersey Corporation, and certain other non-residents, who were more or less directly interested in the operation of that particular distillery. Three residents of Kentucky were joined as defendants, Mc-

Cran, in whose name the whiskey was claimed to have been made, O'Hearn, the superintendent, who had the elevator and guard rails removed, and Bittner, the foreman, who had assigned the decedent to work at that place.

The petition for removal alleged that the charges of negligence against the resident defendants were false, and were known so to be by the plaintiff, who made them for the fraudulent purpose of preventing removal. This petition is thus described in the opinion of the court:

"The defendant corporation and the individual defendants, Kessler and Shipman, joined in a petition for removal of the cause to the Federal court, alleging that no cause of action was stated against the resident defendants, McCran, O'Hearn, and Bittner; that the allegations *charging these defendants with negligence were untrue, and were known by the plaintiff to be untrue when she instituted her suit; that she did not then and does not now expect to prove any of said allegations or to obtain a verdict and judgment against the resident defendants named; and that the latter were joined with the non-resident defendants for the sole and fraudulent purpose of defeating the removal of the cause.*"

That the method of actually making these charges of fraud was practically the same as that employed in the instant case is shown by following the quotation from the petition for removal which was obtained from the record on file in the U. S. Circuit Court of Appeals.

They are the following, omitting the allegations as to McCran as to whom the court deemed it unnecessary to express an opinion:

“Your petitioners state that the allegations in the petition * * * that said accident and injuries were caused by the negligence of the defendant, W. J. O’Hearn, and that the said accident and injuries were caused by the negligence of the defendant, Martin Bittner, are each and all untrue and were known by the plaintiff to be untrue when she instituted this action, and that the plaintiff did not expect at the time she instituted this action, and does not now expect, to prove any of said allegations or to obtain a verdict or judgment against said George A. McCran or said W. J. O’Hearn, or said Martin Bittner; and your petitioners say that the plaintiff inserted said allegations in her petition and joined the said McCran, O’Hearn and Bittner with your petitioners as defendants hereto for the sole and only fraudulent purpose of depriving your petitioners of their right guaranteed by the Constitution and Laws of the United States to remove this action to the United States Circuit Court.”

Upon the filing of this petition the case was removed to the U. S. Circuit Court for the Western District of Kentucky. The plaintiff thereupon moved to have the case remanded to the state court. The motion to remand was denied, and the case going to trial upon its merits resulted in a verdict and judgment for the de-

fendant. The case was taken to the Circuit Court of Appeals upon two assignments—the refusal to remand and the direction of verdict and judgment. The court considered only the removal question, and decided it not on the facts produced in evidence, but upon the petition itself taken in connection with the admitted facts.

After setting forth the facts as above shown, and discussing particularly the relation of O'Hearn, the superintendent, and Bittner, the foreman, to the accident itself, the Circuit Court of Appeals, proceeding in its opinion, said:

“From these facts it is apparent that, if the Distillery Company and Julius Kessler & Co., were liable for decedent's injuries, it is because of the negligent acts of O'Hearn and Bittner, one or both. In other words, if neither of them was negligent, defendants would not be liable; and, if either were properly joined, the case was not removable. According to the settled law in Kentucky, the servant whose negligent act creates the liability of the corporation may, as a matter of right be joined as defendant with the corporation. *Cincinnati & T. P. R'y Co. v. Bohon*, 200 U. S. 221, 223, 26 Sup. Ct. 166, 5, L. Ed. 448; *Winston's Adm'r v. Illinois Central R. Co.*, 111 Ky. 954, 957, 65 S. W. 13, 55 L. R. A. 603. To assert, therefore, that O'Hearn and Bittner were not liable for the decedent's injuries is but another way of asserting that neither the Distillery Company nor Kessler & Co., were liable. Indeed, the circuit

court in denying the motion to remand practically found that plaintiff was affirmatively shown to have no cause of action against any of the defendants. *The assertion of fraudulent joinder of O'Hearn and Bittner necessarily involves the proposition that the cause of action against even the resident defendants was fraudulently asserted.*

"But the rule which permits a removal to the Federal court in case of the fraudulent joinder of defendants whose presence destroys diversity of citizenship can not be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only *that no cause of action is found to exist against any defendant, resident or non-resident, or of permitting removal in a case where the negligence of the corporate defendant can be made out only by proof of negligence of the servant alleged to be fraudulently joined, but against whom a cause of action is stated.*"

Comment upon a proposition so clearly and convincingly stated is unnecessary. We will add only the court's conclusion:

"We agree with the circuit court that the plaintiff's petition stated a cause of action against all the defendants. We are therefore constrained to hold that under the undisputed facts of the case Bittner and O'Hearn *were, as matter of law, properly joined, and thus the allegations of fraudulent joinder as to those defendants were not sustained.*

“This being so, and *they being proper defendants*, the Federal court *had no jurisdiction of the case for lack of diversity of citizenship*. This court therefore not only has the power, but is under a positive duty to declare the lack of jurisdiction of the court below, and to dispose of the case accordingly.

The “undisputed facts” referred to in the above quotation, as forbidding removal of the case, relate merely to recital of the physical conditions and the relation to the accident of the superintendent and the foreman.

So in our case, practically every fact alleged in the petition as to the actual occurrences, the relation of the engineer and fireman as employes of the non-resident defendant, and their participation in the transaction itself, is admitted, and the denials and charges of fraud in the removal petition refer only to the plaintiff's claim that these acts and omissions of the fireman and engineer were negligent; in other words defendants merely deny that there was a cause of action against them.

If therefore the making of these two individual defendants was fraudulent it was equally fraudulent to sue the company who is liable through their acts.

Counsel's Discussion of the Merits.

It remains to notice only one or two other matters referred to by counsel for plaintiff in error. He prints in his brief the assignment of error based upon the court's failure to order a removal made at the close of the plaintiff's evidence. He also discusses the excuse for the fireman's not keeping a lookout and comments upon the engineer's inability to see forward on the left-hand side of the engine.

So far as the action of the trial court is concerned in giving the peremptory instruction, this court holds that this does not militate at all against the position of the plaintiff at the outset of the case. For example in *Illinois Central R'y Co. v. Sheegog*, *supra*, which the State court refused to remove, there was a verdict for the two resident defendants, but the court said (p. 316) that "that fact has no bearing upon the case." Citing *Whitcomb v. Smithson*, 175 U. S. 635.

Counsel for plaintiff in error refer to the facts bearing upon the negligence of the two resident defendants and the fact that they "were acquitted", evidently to obtain support for the allegations of the removal petition that they were not negligent. It is true that the engineer could not see because of the obstructing boiler, a circumstance the plaintiff could not have foreseen; but that a wrong impression regarding the fireman may not linger, even though unknown, in the minds of the court, we are justified in calling attention to what the Court of Appeals of Kentucky said about his negligence and the excuse

adroitly urged by counsel for his failure to keep a lookout. This opinion also bears pertinently upon the question whether plaintiff's charge of negligence under the circumstances admitted by the record is "palpably untrue" (as counsel admit at page 5 of his brief it must be), in the light of the Kentucky Court of Appeals' holding that the fireman was negligent and was individually liable for his negligence. At page 19 of the Transcript, the Court of Appeals, discussing the defendants' negligence, says:

"We have then this condition of affairs—this train when it started from the depot was within a few feet of a much traveled street in a populous district of the city, but the engineer, however sharp a lookout he was keeping, could not see persons at the street crossing approaching or on the track on the fireman's side after the engine started, and the fireman was engaged in looking at the rear end
 305 of the train. The result of this was that *no lookout for travelers at this crossing was kept at the time Mrs. Banks was struck.* The engineer could not see the crossing in front of his engine, and the fireman was looking in another direction. As, under the circumstances of this case, it was the duty of the company, *through its engineer and fireman*, to keep a lookout at this time and place, there was evidence sufficient to authorize a submission of the case to the jury and sustain a verdict, upon the ground that if a lookout had been kept by the fireman, the

accident to Mrs. Banks could have been averted. So that the vital question in the case is—was the fireman negligent in failing to keep a lookout. We have never gone to the extent of holding that railroad companies should have a third person in the engine to keep a lookout at times and places where this duty is demanded, and when the other duties and situation of the engineer and fireman were such that they could not do so. Nor have we ruled that either the engineer or fireman must postpone, when they are approaching a crossing at which the presence of travelers must be anticipated, the performance of essential duties in connection with the running of the train that interfere with their keeping a lookout. Nor is it necessary to sustain the judgment that we should so hold in this case, *as we think the fireman was*
 306 *guilty of negligence in failing to keep a look-*
out in front of the engine at the time he was
looking at the rear of the train, and that if
he had been keeping such a lookout he could have
discovered the presence of Mrs. Banks on the track
in time to have signaled the engineer to stop the
train, and that it could have been stopped before
striking her. If it was not the duty of both the fireman and engineer under the circumstances described to keep a lookout, it is difficult to imagine a state of case in which the lookout duty would be required, as men, women and children at this point were constantly crossing the track in going from one part of the city to another, and from one street to another.

It is attempted, however, to excuse the conduct of the fireman in looking at the rear of the train in place of in front of the engine upon the ground as stated by counsel

‘that it is more important for the safety of the traveling public that the fireman in such case should look back to see if the train is clearing the station without injuring passengers and to be ready to receive signals in case of danger where persons are boarding the train or alighting from it, than it is for him to look ahead.’

But this argument does not meet or answer the duty of the railroad company at the time and place this accident happened. There may be times and places in which a fireman would be excused in looking towards the rear of the train, rather than in front of it, but this was neither such time nor place. The train was equipped with a full crew, who could and doubtless did exercise care to see that passengers
 307 gers were not injured by the negligence of the company in boarding or alighting from the train, and to them the fireman should have left this duty. Nor is the negligence of the fireman to be excused upon the theory that he could not have anticipated that Mrs. Banks would step from a place of safety on the track in front of the moving engine. It is negligence of this character on the part of travelers that persons in charge of an engine approaching crossings where travelers have a right to be and go that makes it the duty of trainmen to anticipate

and protect them if they can from accident and injury. Except for the fact that travelers are negligent, it would not be necessary for trainmen to keep a lookout at any street or crossing. Nearly every crossing accident that happens is due in more or less degree to the negligence of the traveler, and it is the recognition of this carelessness or thoughtlessness on the part of the traveling public that has induced the law to impose upon persons in charge of an engine the duty of keeping a lookout at crossings.

“Nor does the fact that the bell may have been ringing or that the crossing gates on Main Street were down, excuse or diminish the lookout duty. It is more important for the safety of travelers at places like this that this duty should be observed than that the bell should be rung or the crossing gates closed, as the ringing of the bells and the closing of the crossing gates offer little protection to persons who
 308 thoughtlessly or carelessly go upon railroad tracks in front of approaching trains. The fact that such persons, heedless of the danger, go upon the tracks when bells are ringing and crossing gates are down is one of the reasons why the lookout duty is required and should be maintained. In short, the chief purpose of the lookout duty is to protect the traveling public from the consequences of their own negligence. From the facts, we think it may safely be said that *the fireman was negligent and that his negligence was the proximate cause of the*

injury, and that it was sufficient to authorize the verdict and judgment against the railroad company."

The court then takes up the technical defense of the fireman—the distinction between misfeasance and nonfeasance—and thus disposes of the arguments upon which the trial court gave a peremptory instruction to find for him:

"But the question remains, was this negligence of such a character as to warrant a judgment against him. It is true his negligence consisted in his failure to perform a duty, but it was more affirmative than negative negligence. He could and should have performed the duty of keeping a lookout. The duty of keeping a lookout was imposed upon him and did not depend upon what some one else should have done but failed to do, or upon what some one else did not do but should have done, as was the case in *Cincinnati R. Co. v. Robertson*, 115 Ky. 858, and *Dudley v. Illinois Central R. Co.*, 127 Ky. 221. * * *

"The failure of the fireman to keep a lookout was more than mere nonfeasance. It was a breach upon his part of a positive duty enjoined upon him, and *his failure to perform this duty was actionable negligence*. If the engineer of a train fails to keep a lookout, and thereby injury results to a traveler, there can be no doubt that the engineer would be personally liable, and it is as much the duty of the fireman as it is the engineer to keep a lookout, and if he *negligently fails to do so as in this case, his liability*

is the same as that of the engineer. *Illinois Central R. Co. v. Coley*, 121 Ky. 385."

CONCLUSION.

In conclusion we repeat that no reason was shown why the plaintiff should not have joined the resident defendants with their employers. There was no complication to hinder. The case was a clean-cut illustration of the very sort of actions which the Kentucky court and this court had repeatedly approved. And as to the charge of negligence, it would be hard to find a state of facts (admitted here) which would more nearly constitute negligence *per se*, than for a train to be run blindly alongside an occupied walkway and toward and across a city street with the engineer's view on that side blocked by the boiler, and with the fireman, stationed on that side, keeping no lookout ahead.

In addition to the declaration of the Kentucky law that this is negligence, found in the opinion in this case, there were numerous other Kentucky cases (decided before plaintiff was called upon to determine in filing his suit whether the admitted facts constituted actionable negligence), wherein the same doctrine was announced. An example of these cases is *L. & N. R. R. Co. v. Gilmore's Admr.*, 114 S. W. 752, where the Court of Appeals of Kentucky, in considering a case not nearly so strong as ours, where the fireman failed to keep a lookout in a city because he was shoveling coal, said of his duty:

"If the conditions are such that the engineer can not do it, as if his engine is on a curve so that his view is obstructed, or if it is otherwise impossible for him to do it, the fireman must keep the lookout. He will not be excused because he may have occasion at that moment to put coal into the fire box of the engine, or to perform any other duty about it less urgent and imperative than that of seeing to the safety of lives either on the train, or of those on the track. As between the duty of firing the engine and looking out for the safety of people to whom he is under duty to look out for, whether passengers, laborers, travelers, upon highway crossings or licensees he must give performance to that duty which conserves human life and safety."

That recovery could be had under the circumstances of this case, notwithstanding the conceded contributory negligence of Mrs. Banks, had also been established by many Kentucky cases. A fair example of the cases declaring this rule of humanity is *L. & N. R. R. Co. v. Taylor*, 104 S. W. 776, where, in discussing this exact question, the court said:

"If the traveler on the highway fails to use ordinary care for his own safety either from misapprehension, inadvertence, or mistake, he does not thereby become a trespasser or forfeit that protection which the law throws around human life. In such a case he may not recover for his injury unless after

his peril was discovered, or by ordinary care should have been discovered by those in charge of the train, the injury to him might by ordinary care, have been averted."

The court in this case held that, had he been keeping a lookout, the fireman could have caused the train to be stopped in time to save the woman's life.

Believing as he does that one hundred per cent of intelligent men would think that the facts here admitted justified at least an honest charge of negligence, the plaintiff, though entitled to the same right of preference in the matter of forums as to the defendant Railway Company, is more charitable than defendant, and hence does not say that this remarkable petition for removal is fraudulent, but he does think that it borders closely upon the frivolous. Filed, as he thinks, without the semblance of justification, and yet with the result that the plaintiff is kept out of his money all these years, he now earnestly asks that the case be affirmed by this court with damages.

Respectfully submitted,

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